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ABSTRACT

This document is a collection of 53 topic outlines and conference papers whose topics cover a multitude of aspects of educational law. Subjects include the impacts of the Individuals with Disabilities Education Act (IDEA) on "normal" students, rights of nontenured teachers, sexual discrimination and harassment, school disciplinary issues, technology and the law, alcohol and drug issues, investigation without litigation, the affects of off-duty conduct on employment actions, corporal punishment, legal issues in teacher accountability, religion and the schools, collective bargaining and retirement, drug-testing policies, educational equality, charter and voucher schools, school administrator education in school law, school desegregation and barriers to integration, changes and trends in methodologies of teaching school law, violence and school-security issues, issues surrounding the superintendent's contract, alien and homeless student education issues, juvenile offenders and residential placement issues, funding-equity issues, compensatory educational services, dress codes, governance over school curriculum, issues involving teacher tenure, gifted student issues, functional behavior assessment, school personnel and student confidentiality issues, interdisciplinary collaboration between administration and law students, and sentencing youth as adults. (RT)

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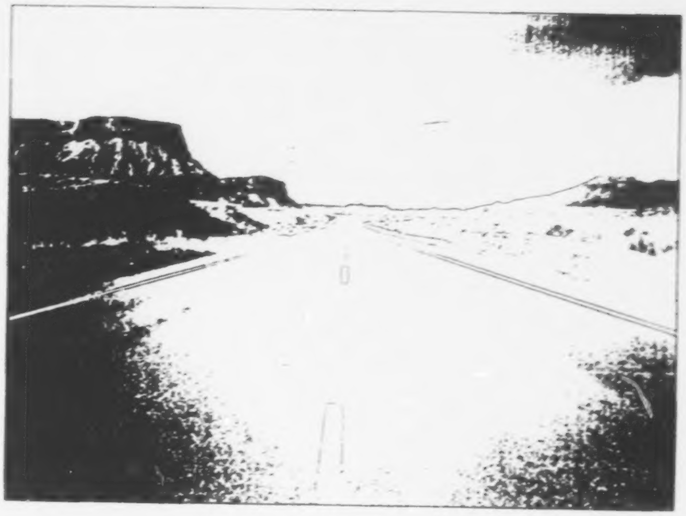

2001: A Legal Odyssey

2001 Conference Papers
Education Law Association
47th Annual Conference
November 15-17, 2001
Albuquerque, New Mexico

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Topic Outlines

Education Law Association
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Albuquerque, New Mexico

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THE IMPACT OF IDEA ON THE REGULAR STUDENT

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The Impact of IDEA on the Regular Student

Without a doubt, discipline, as it pertains to students who have identified disabilities and are eligible for special education services, is one of the most challenging and perplexing issues that school administrators, teachers, and parents face in implementing the Individuals with Disabilities Education Act (IDEA). One of the most controversial aspects of discipline under IDEA is the 'double standard' that is present in the procedures. Students, eligible for special education services, are treated differently in certain situations than students without disabilities. The challenge, though, becomes even more complex and difficult when one realizes that the specific procedural safeguards for discipline under IDEA now apply not only to students with identified disabilities who are eligible for special education and related services but, also to students who have not yet been found eligible for such services (Section 300.527 of the 1997 Amendments of IDEA). This seemingly then provides, for this population, those procedures that validate this double standard.

Specific conditions and actions must be met in order for the these procedural safeguards to be extended to this particular group of students. The key focuses on the word 'knowledge'. School districts are required to provide the same procedural safeguards in disciplinary actions for those students who are not yet eligible for special education and related services for those eligible students when the school district has knowledge that the student had a disability prior to the misconduct that triggered the disciplinary actions and sanctions. What constitutes this 'knowledge' will be discussed later in this paper.

It is safe to say that school districts and parents alike are not only confused as to what group of students fall into this category but as to the responsibilities for the implementation of this mandate. Organizations such as Council for Exceptional Children (CEC) and Council of Special Education Administrators (CASE) have yet to speak to the provision of procedural safeguards under IDEA to 'students not yet eligible'. Members of these organizations and others who look to these organizations for guidance are unsure as to what steps and directions should be taken to implement this new provision.

Historical Review of Case Law

Before there can be discussion of the changes in language with the 1997 Reauthorization of IDEA it is necessary to review the procedures that are in place for students who are eligible in regard to discipline under IDEA. It is important to recognize that IDEA, previously known as the Education for All Handicapped Children's Act (EAHCA), did not address any aspect of discipline, neither procedures nor sanctions until the 1997 Amendments of IDEA. Procedures and processes that were followed were those that were set down in case law. As one would expect, these could and, in fact, would change as case law altered the interpretation and the implementation of discipline procedures. Sometimes the change would be to a significant degree as in *Honig v. Doe, 484 U.S. 305 (1988)*, a decision that gave the school districts the option of petitioning for a temporary restraining order (TRO) to remove students who were considered dangerous from the school setting.

Understandably, school personnel and parents alike were often confused and unsure as to what procedures were in place and what sanctions were possible. This confusion further fueled the argument and concern that double standards in the actions and sanctions were being created. Procedures and processes for students with disabilities were significantly different than those for students without disabilities due to the procedural safeguards found in IDEA.

The IDEA Amendments of 1997 finally established statutory and regulatory guidance for the procedures for discipline actions related to students with disabilities. School administrators, teachers, and parents are becoming more confident that the mandated procedures were standard and uniformly followed.

Case law for disciplinary actions was launched with *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss*, in establishing that education was a property interest protected under the Fourteenth Amendment, specified the procedural requirements for a 10 school day suspension for all students, which became the cornerstone for discipline procedures for students with disabilities. *Stuart v. Nappi*, 433 F. Supp 1235

(1978) in clarifying that students with disabilities could be disciplined, determined that a long term suspension, which was considered to be longer than the 10 days (cited in Goss) or expulsion was considered a change of placement and, thus, was subject to change of placement procedures. Courts in *Doe v. Koger* 480 F. Supp. 225 (1979), S-*1 v. Turlington*, 635 F. 2nd 342 (5th Cir. 1981), *Kaelin v Grubbs*, 682 F. 2nd 595 (6th Cir. 1982), *Prince William County School Board v. Malone* 762 F 2d. 1210 (1985), and *Doe v. Maher* 793 F. 2d. 1470 (9th Cir. 1986) ruled, as well, that long term suspension (longer than 10 school days) or expulsion constituted a change of placement, which triggered the necessary procedural safeguards.

Stuart also clarified that the "stay put" clause did apply to discipline situations. "Stay put" allowed the eligible students to remain in their current placement, pending due process hearings. Stay put is effected unless the parents and the school agree on an interim change of placement or if it is determined that the student was considered dangerous.

In addition, S-1 v. Turlington 635 F. 2nd 342 (5th Cir. 1981), established that for a discipline sanction to result in a long term suspension (longer than 10 school days) or expulsion, both considered to be a change of placement which then triggered procedural safeguards, the IEP Committee, as a group of knowledgeable individuals, must determine if a causal relationship between the behavior and the disability and the behavior and the placement exists. If a causal relationship exist between either the disability/behavior or the behavior/placement, the long term suspension or expulsion is not an option. If there is not a causal relationship in both areas, the long term suspension or expulsion could continue, as long as all appropriate procedural safeguards were followed. Turlington (1981) clarified, as well, that there could not be a cessation of special education services during the long term suspension or expulsion. To do so would be a violation of a free and appropriate public education (FAPE). *Metropolitan School District of Wayne Township, Marion County, Indiana v. Davilia*, 969 F. 2nd 4885 (7th Cir. 1992) upheld a memorandum written by the Office of Special Education and Rehabilitation Services (OSERS) requiring the continuation of special education services during a long term suspension or expulsion even when the removal was for reasons unrelated to their disabilities.

The issue of unilateral removal of a dangerous student was addressed in *Victoria L. v. District School Board*, 741 F. 2d. 369 (1984). The court held that a district could remove a student, considered dangerous to himself or others to a more restrictive setting unilaterally if necessary. *Texas City Independent School District v. Jorstad*, 752 F. Supp. 231 (S.D. Tex. 1990) affirmed, as well, the removal of a student to a more restrictive setting if it was clear that the student was a danger to himself and others. The issue of unilateral removal was settled with *Honig* (1988).

Honig (1988) confirmed that students could not be removed from school for longer than 10 school days, as this is considered to be a change of placement, without invoking the procedural safeguards for change of placement. *Honig* (1988) stated that the causal relationship between the behavior/disability and/or the behavior/ placement must be established in order for a long term suspension (more than 10 school days) or expulsion to be an sanction option. Through *Honig* (1988) it was determined that there could not be a long term unilateral removal from school. Typical school discipline procedures, applicable to all students were allowable, including short term suspensions up to 10 school days. In the case of a student who met the dangerous standard, i.e. the student was "substantially likely" to be danger to himself or others, and if the parent refused to a change of placement, or when a parent challenge was filed which would have normally triggered the stay put clause, the district could request an injunction or a temporary restraining order (TRO) through the court, which would prohibit the student from returning to the current placement while the parents and the school resolved the challenge or the issue of placement. The district carried the burden of proof that the student was likely to cause harm to others and that the procedural avenues under IDEA were futile.

Significant to this same review are the Office of Civil Rights (OCR) and OSEP Memoranda and case law that began addressing students who, for a variety of reasons, were not receiving special education and/or related services, but were invoking the procedural safeguards under IDEA. The common points of inquiry focused on when the district had notice or knowledge that the student's misbehavior might be part and have a relationship to their disability and/or the stay put clause under IDEA.

Mitchell Yell, in the *Law and Special Education (1998)*, discusses an 1989 OCR Letter of Finding in which the school district was determined to have violated OCR regulations by expelling a student with Attention Deficit Hyperactive Disorder (ADHD) without evaluating the student and considering if there was a relationship between the misbehavior and the disability prior to the expulsion. Yell reports that "OCR noted that despite the request from the parent for a full evaluation of the child, the school district had failed to do so." (p.341)

Hacienda La Puente Unified School District of Los Angeles v. Honig (976 F. 2nd 487 (9th Cir. 1992) held that all students who had disabilities, regardless of being previously identified, were entitled to the procedural safeguards found under IDEA. The court reiterated that the guarantee of IDEA is to prevent school districts from denying educational opportunities to or discriminating against students with disabilities. The identification of disabilities flows through all aspects of the procedural safeguards. To deny this would allow school districts to refuse to identify a disability, particularly in discipline situations. Unfortunately, the issue of stay put was not addressed in the decision. A court ruling in *Doe v. Rockingham School Board*, 658 F. Supp. 403 (1987) held that a student suspected of having a disability was entitled to the procedural safeguards, i.e. stay put, under IDEA. The school district did have knowledge of the disability through notice from a psychologist, and was ordered to provide an appropriate educational program. *M.P. v. Governing Board of Grossmount Union School District*, 858 F Supp 1044 (S.D. Cal 1994), confirmed that the stay put clause under IDEA could possibility be abused by students who did not have disabilities. These students, by alleging to have disabilities, could invoke the procedural safeguards regarding discipline under IDEA as they tried to bypass the normal discipline actions and sanctions governed by state regulations. Nevertheless, stay put was an automatic action.

whether the student had been previously identified with a disability, or was suspected of having a disability. *Metropolitan School District of Wayne Township v. Davila* (1992) held that for courts to invoke the stay put provision, it must be demonstrated that the school district had knowledge or should have had known that the student had a disability.

An OSEP Memorandum (No. 95-16, 22 IDELR 531 540, April 26,1995), addressed the stay put provision in regards to those students who have not been previously identified as having a disability in stating that:

> For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due process hearing or other appeal *after* a disciplinary suspension or expulsion has commenced does *not* obligate the school district to reinstate the student's prior school status. (note 4)

It did state, however, that if the school district should have had reasonable knowledge that there was a need for special education services, a court could order the stay put provision. Stay put was also clarified in *Steldt v. School Board of Riverdale*, 885 F. Supp. 1192 1198 (W. D. Wis. 1995) but with more flexible approach. The court applied the stay put provision only after finding that the student had some chance to successfully prove to the hearing officer that there was, in fact, a disability and that teachers did find the need for special education services.

Rodiriecus L. v. Waukegan School District, 90 F 3rd. 249 (7th Cir. 1996) addressed, as well, the possibility of abusing the procedural safeguards, including stay put, to avoid expulsion. In order for students to invoke the procedural safeguards under IDEA, the school district must have known or who have had reason to suspect that a disability was present. The court did clarify that if the parent did not request an evaluation and there was average academic performance then there was no basis for a suspect standard. To aid in making this determination the court established a four factor test: 1. is there a likelihood that the student will succeed in his claim of a disability; 2. is there harm to the student if the stay put is not invoked; 3. will that harm to the student be greater than or outweigh the harm to the district; and 4. will there be an impact to the public interest. It must be also shown that the student would have or would have been reasonably identified as eligible for special education and related services through IDEA procedures. For support for this position, the court referenced the OSEP Memorandum No. 95-16, April, 26, 1995.

The courts have also addressed the issue of weapons as the mitigating factor for expulsion. This issue, though, becomes even more intense when the student asserts procedural safeguards as a student with a disability but not identified eligible for special education. In *Brown v. Metropolitan School District of Lawrence Township*, 945 F. Supp. 1202 (S. D. Ind. 1996) a student with diabetes was expelled for knowingly possessing or using a knife during a school activity. The parents alleged that the misbehavior was affected by low blood sugar levels and, as such, was part and party to her disability. The court affirmed the school district's decision to expel without a determination of a causal relationship between the disability and the misbehavior as the student was not identified as disabled.

Ashland School District (28 IDELR 630 SEA OR 1998) addressed the situation of students not identified as eligible students invoking the procedural safeguards under IDEA. The Oregon Department of Education determined that the student was entitled to procedural safeguards under IDEA in that the district should have suspected that a disability was present based on deteriorating student behavior and poor performance in school. *P. J. v. Eagle-Union Community School* 99-2079 (7th Cir. 1999) held that a district did not violate IDEA by failing to identify a student as eligible for special education services. The district was correct in considering the improved performance of the student in school, the lack of a diagnosis by a medical doctor, and the parents rejection of support services in making its decision. In fact, the court stated that " Eagle Union was not required to seek authority to evaluate P. J. in the fact of his parental opposition".

In *Colvin v. Lowndes County School District,* 114 F.Supp. 2d 504 (N.D. Miss. 2000) the court held that for a student, not yet eligible, to be provided the procedural safeguards, i.e. stay put, the misbehavior must be related to the alleged disability. *Colvin* also addressed the issue of expulsion. If expulsion is being considered as a sanction, the school district must weigh all relevant facts pertinent to the circumstance and situation. To simply administer, as standard policy, an expulsion, without investigation of a particular or unique situation, may disallow a student his/her constitutional due process rights. Expulsion must be on an individual basis, with regards to the particular facts and not be "blindly meted out".

One court ruled on the particular issue of eligibility for special education services and students not yet eligible. *Miller v. Board of Education of Caroline County*, 114 Md. App. 462. 690 A. 2d 557 (Md Ct. Spec. App. 1997), found that a district, which did have prior knowledge that a disability was present, had not violated a student's procedural safeguards by not conducting an evaluation prior to an expulsion. The court confirmed that the procedural safeguards, under IDEA, applied only to those students who were not able to realize educational gain or benefit in the general education program. In a similar court ruling a student, who did have an identified disability, was not entitled for procedural safeguards under IDEA in that his special needs were being met successfully in the general education classroom with minor modifications (*Norton v. Orinda Union School District* 97-17029 9th Cir. 1999).

Amendments of 1997

The Amendments of 1997 transitioned the procedural safeguards regarding discipline from case law into regulatory status. School districts and parents now have some measure of clarity as to what procedures are to take place in particular situations. School districts are allowed to suspend students with disabilities for short periods of time, e.g. 10 school days or less, as long as the procedural due process applicable to all students is followed. Educational services are not required to be provided during the short term suspensions, reinforced by the 1995 OSEP Memorandum 95-16.

For suspensions longer than 10 school days or expulsions, either of which triggers a change of placement, manifestation determination reviews (MDR), conducted by the IEP committee (OSEP Memorandum 95-16, 1995) are required. It is important to note that a change of placement is also established if a series of short term suspensions constitute a pattern that may result in removal from school for more than 10 school days, thus, requiring a MDI. This requirement is supported by both a 1988 OCR Memorandum (EHLR 307:05) and the 1995 OSEP Memorandum (95-16). Multiple short term suspensions (i.e., 10 consecutive days or less) are allowable when they are the result of separate incidents of misbehavior and these suspensions would be applicable to students without disabilities. School districts, though, are cautioned that these multiple short term suspensions could constitute a significant change of placement. The test for this change of placement rests with the length of the removal, the total amount of time the student is removed and the proximity of the removals to each other must also be addressed, as clarified in the 1988 OCR Memorandum (EHLR 307:05).

As stated earlier, the IEP committee is required to determine if a manifestation or relationship between the behavior and the disability exists. To do this, the committee must address the placement of the student, the appropriateness of the IEP and if the IEP was properly implemented. Two questions must also be considered. First, did the disability impair the student's ability to understand the impact and consequences of the behavior? It is important to note that this question does not ask if the student knows the difference between right and wrong, which was established by the 5th Circuit Court in *Turlington*, but if the disability interferes with the student being able to understand the result and the consequences of the behavior. The second question focuses on whether the disability impairs the student's ability to control the behavior. In other words, was the behavior one that was impulsive or spontaneous, or one that was a result of thought and intent. For there to be a manifestation of determination, there must be an established cause and effect relationship.

If the IEP committee finds that a relationship or manifestation does not exist and the IEP is appropriate and has been delivered as written and the setting is appropriate, the school district may apply disciplinary actions and /or sanctions that would be administered to students that do not have a disability. If the sanction is continued removal from school, educational services can not be terminated, held first in *S-1 v. Turlington* in 1981 and, then in *Kaelin v. Grubbs* in 1982. If the IEP committee does find that there is incorrect placement or does find that the IEP is neither appropriate nor implemented correctly, a manifestation between the behavior and the disability would be established. The school district would not be able to continue with the suspension or expulsion. Rational is, of course, that a student cannot be denied special education services, or FAPE, due to a misbehavior that has a causal relationship with the disability.

The Amendments of 1997 also clearly address the procedures to be in place when a student with a disability presents a danger to him/herself or others. There are several options available to school districts when this situation exists. An emergency suspension is possible as long as the days do not exceed

10 school days. A change of placement to a more restrictive or to a less restrictive placement is another possibility. A district can, when the parent does not agree with a change of placement and the district is convinced that the student is dangerous to himself or others, petition, with a preponderance of evidence, for a TRO or a Honig Court Injunction from a Hearing Officer. Prior to the Amendments of 1997 a TRO was petitioned only to the court (*Honig,* 1988, *Texas Independent School District v. Jorstad* 752 F. Supp. 231 S.D. Tex. 1990, *East Islip Union Free School District v. Anderson* 615 N.Y. S. 2d 852 (Sup. Ct. 1994). *Light v. Parkway C-2 School District,* 41F. 3d 1223 (8th Cir. 1994) established a two-part test for TROs. In Part One: the district must prove that keeping the student in the current placement is likely to result in injury to the student or to others. Actual injury is not required as part of the test. Part-Two requires that the district has documentation that reasonable attempts have been made to minimize the risk of injury. Essentially, the TRO provides time which allows for the district to conduct a MDR or work with the parent on a change of placement.

Also required is the completion of a functional assessment that analyzes the behaviors beyond the surface problem. Mandated, as well, is the development of a Behavior Intervention Plan (BIP) which provides intervention and prevention strategies and instruction for the misbehaviors prior to the MDR.

School districts can, under the Amendments of 1997 and reinforced by the Improving America's School Act, unilaterally place students who bring weapons to school or a school function or who are using, possessing or selling illegal drugs in an interim alternative educational setting (IAES) for up to 45 days. A Hearing Officer can also place a student in an IAES when provided documentation of behavior that goes beyond a preponderance of the evidence. The IAES setting must be determined by the IEP Committee and must allow the student to continue participation in the general education curriculum as well as the goals and objectives and services documented on the IEP.

Protections for Students Not Yet Eligible

The Amendments of 1997 have now extended these procedural safeguards under IDEA (i.e. stay put, manifestation determination, and due process hearings) to students that are not yet eligible for special education and related services but have, through a misbehavior, violated a rule or conduct of the school district. This section was established to remove the potential abuse of the IDEA protections by students who do not have disabilities and are not eligible for special education services but who look to circumvent or delay what would be appropriate discipline sanctions.

These procedural safeguards are applicable only when the school district, or it's personnel, had *knowledge* or, minimally, "constructive knowledge " that the student had a disability and was in need of services before the misbehavior occurred that resulted in the disciplinary sanction. The school district is seen to have knowledge of the student and the disability if any of the following conditions are applicable:

1. The parent of the student has expressed concern in writing (or orally if the parent does not know how to write or if the parent has a disability that interferes with the ability to write a statement) to

personnel of the school district that the child is in need of special education and related services. This statement must have been given to appropriate personnel of the student's school district,

2. The behavior or the performance of the student demonstrates the need for special education and related services;

3. The parent of the student has requested an evaluation for the student in accordance with Section 300.530-330.536; or

4. The teacher of the student, or other personnel of the school district, has expressed concern about the behavior or performance of the student to the director of special education or to other personnel as directed under the district Child Find or special education referral system.

These factors, though know in regulation, gave guidance to hearing officers in pre-reauthorization days on the issue of suspected disability as they ruled on due process hearings, held in *Hacienda* (1992) and *Ashland* (1998). It was only natural that the language of this section would model what had already proven to be effective.

Factor 1 (parental concern expressed in writing, etc.) can possibly be answered with clear documentation or communiqué maintained by the district's personnel and/or the parent. Factor 2 (behavior or performance of the student), though difficult to assess due to different degrees of importance and interpretation of information, can be founded with objective formal and informal data. Factor 3 (parental request for an evaluation) can be answered with documentation that would be compiled by the district, teacher, and/or parent. One of the hardest factor to assess, though, is that which addresses the teacher or school personnel expressing concern about the performance and/or behavior of the student. The Department of Education (DOE), in an effort to clarify school district's responsibility in this specific factor of the knowledge standard, stated that only those staff concerns that are made " in accordance with the agency's established child find or special education referral system" would trigger this factor. Statements of concern are operable when made by " personnel who have responsibilities of child find or special education referrals in the agency". It is suggested that the DOE does not expect that offhanded or cavalierish statements of concern made between personnel would comply with the knowledge standard. *DOE Summary of Changes*, 64 Fed. Reg. 122412 (March 12, 1999).

The school district will not be held to the knowledge standard if it received information pertaining to parental or personnel concerns if one of the following two (2) events had occurred:

1. the district had conducted an evaluation and determined that the student was not eligible, or
2. the district had determined that an evaluation was not necessary and provided the parents with proper notice of that determination.

When there is no basis of knowledge prior to the misbehavior, the district can then administer the same disciplinary procedures and sanctions that would be applicable to students without disabilities whose misbehaviors were consistent. A 1995 OSEP Memorandum (95-16) clarifies that if the parent requests a due process hearing under IDEA, the student must remain in the disciplinary placement, pending the hearing officer's ruling.

If the parent should make a request for an evaluation for the student during the disciplinary sanction, the evaluation should be conducted in an expedited manner. The student, though, is to remain in the disciplinary setting during the evaluation process. If it is determined that the student does in fact qualify for special education services under IDEA, the district is then responsible for providing appropriate services for the student. As part of these appropriate services, the IEP committee must reconvene to consider the manifestation determination. If a manifestation is found, the district must then place the student in an appropriate setting that is not considered to be one for discipline.

It is important to note that the issue of discipline, for students with and for those not yet identified, is an ongoing challenge, surrounded with a great deal of controversy and potential change. Currently two congressional amendments, included into the reauthorization of the Elementary and Secondary Education Act, address the discipline procedures currently found in IDEA. Both amendments have passed through their respective Houses and are currently in Conference Committee. Both amendments severely impact the procedures and sanctions that districts have implemented for years, either through case law or the 1997 Amendments.

The House of Representative's amendment, introduced by Representative Norwood, applies to disciplinary situations that deal with students with disabilities who, at a school, have guns, knowing possess or use illegal drugs, sell or solicit the sale of a controlled substance, or commit aggravated assault or battery, which does include threats of violence. The aspect of this amendment focuses on equal treatment for all students. The double standard of discipline would, in effect, be void. School districts, then, would be responsible for establishing their own policies and procedures on disciplinary procedures and sanctions. School districts would treat all students the same without any consideration of manifestation. A complete cessation of services would occur during any removal from school, (i.e. suspension or expulsion), regardless of disability, or causal relationship. Prior knowledge of a disability is not addressed in this amendment. There is also no discussion in the amendment that would give guidance in situations where parents, after a misbehavior and/or sanction, request an evaluation to determine a disability or eligibility. The Sessions Amendment, introduced by Senator Sessions, also addresses equal treatment for all students who violate school rules, including disruptive behavior, or "assault or threaten to assault a teacher, a teacher's aide, principal, school counselor or other school personnel, including independent contractors and volunteers". The Sessions Amendment does allow for a manifestation to be determined between the misbehavior and the disability, but there is no clarity on who would be involved in the determination of a manifestation. If there is a manifestation, some level of service would be required to be implemented, but the extent or type of service is not addressed. One aspect of the amendment would allow the building administrator to unilaterally remove a student who has any discipline infraction to a restrictive setting, regardless of parent disagreement or refusal. This amendment does allow for an expedited hearing process for disagreements or challenges.

As one would anticipate, these drastic changes in both amendments have parents, advocacy groups, and professional groups deeply concerned. There is grave concern as to what will be the final product or action of the Conference Committee. Mr. David Egnor, of CEC, states that CEC and other organizations, such as PACER, the National Association for Protection and Advocacy System (NAPAS), National Coalition of Parent Centers, and Center for Law and Education, are concerned about the cessation of services as well as other issues found in these amendments and advocate that any changes to the discipline procedures under IDEA should be addressed in the reauthorization of IDEA which is to begin 2002.

This current situation is only reflective of the challenges and controversies that surround the issue of discipline, both for students with disabilities and eligible for special education services and those students not yet eligible. The issue of discipline will not be easily nor quickly resolved and demands constant study.

THE RIGHTS OF NONTENURED TEACHERS

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The Rights of Nontenured Teachers

I. THE RIGHTS OF NONTENURED TEACHERS – A STATE-BY-STATE SURVEY OF EXISTING LEGAL PROTECTIONS

II. THE RIGHTS OF NONTENURED TEACHERS -- THE NEW, "CLASS-OF-ONE" EQUAL PROTECTION THEORY

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I. THE RIGHTS OF NONTENURED TEACHERS – A STATE-BY-STATE SURVEY OF EXISTING LEGAL PROTECTIONS

Introduction and Executive Summary

The National Education Association Office of General Counsel recently completed a state-by-state survey of what legal rights, if any, nontenured teachers may enjoy when their probationary teaching contracts are nonrenewed. NEA-OGC staff sent questionnaires to legal counsel for 51 NEA state affiliates and reviewed all pertinent state statutes. The detailed results of this study are set forth in the chart entitled "Employment Rights of Nontenured Teachers (K-12) by State," which follows this Introduction and Executive Summary.

It may be useful at the outset to highlight the distinction between "substantive" rights and "procedural" rights.[1] Almost every state has enacted a "tenure" law granting teachers -- after a probationary period of specified duration -- the *substantive* right not to be disciplined or discharged except for "just cause," *i.e.*, some legitimate reason related to serious misconduct or poor job performance. The name for this substantive job protection varies from state-to-state, and includes: tenure, continuing contract status, career status, nonprobationary status, and permanent status. The required probationary period also varies greatly, from two to five years.[2] In this paper, we use the terms "tenure" and "tenured" teacher to apply broadly to all of the state laws that afford teachers this substantive job right.

In addition to substantive "just cause" protection, tenured teachers also have certain *procedural* "due process" rights, *i.e.*, the right to have the just cause issue decided pursuant to fair procedures. In this context, "due process" means notice of the reasons for the nonrenewal and a formal hearing before an unbiased person or panel, where the school administration has the burden to prove that the charges are true and justify termination. At the hearing, the tenured teacher has the right to testify, to call and cross-examine witnesses, and to have the assistance of an attorney.

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[1] Nontenured teachers in every state also enjoy the protection of various federal and state civil rights laws that prohibit employment discrimination on the basis or race, gender, disability, age, religion, color, and national origin. A discussion of the nature and extent of these substantive job rights is beyond the scope of this paper.

[2] *See generally*, Education Commission of the States, "Teacher Tenure/Continuing Contract Laws: Updated for 1998," posted at: http://www.ecs.org/clearinghouse/14/41/1441.htm.

In virtually every state, probationary or "nontenured"[3] teachers do *not* have the substantive right to keep their jobs except for just cause.[4] Nor do they have the procedural right to a full, formal due process hearing in connection with a school district's decision not to renew their contracts.[5] Many states, however, have enacted laws that do provide nontenured teachers with *some* degree of substantive and/or procedural job protection against arbitrary nonrenewal decisions, although the rights created by these statutes are not the same as -- or as valuable as -- "tenure" rights. For purposes of discussion, we have grouped these laws into three broad categories: 1) limited due process, 2) mandatory performance evaluations and plans of improvement, and 3) collective bargaining for substantive job rights. Each is discussed in turn below.

1. Limited Due Process

In a majority of the states, when a school board decides not to renew the contract of a nontenured teacher, the teacher does not have the right to know the reason(s) for the nonrenewal decision or the right to meet with the school board or superintendent to discuss the decision. Many teachers find this practice to be extremely unfair and believe it promotes employment decisions based on personalities rather than teaching effectiveness.

A number of states, however, have passed laws that at least partially remedy this unjust practice. The NEA study concluded that a total of 21 states have enacted statutes that give nontenured teachers *limited* due process rights, *i.e.*, both the right to know the reasons for a nonrenewal decision and the right to meet with the school board or superintendent to argue why they should be rehired. These states are: Alaska, Arkansas, Connecticut, Delaware, Idaho, Indiana, Iowa, Mississippi, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

It's important to note that the "notice and meeting" rights conferred by these laws do not give nontenured teachers the same formal, procedural "due process" rights as tenured teachers have. The superintendent, for example, doesn't have to prove just cause, and the teacher doesn't necessarily have the right to call witnesses or have an attorney present. But these rights to "informal" due process can be quite valuable. In fact, the Wisconsin Education Association Council conducts special training on how employee representatives can persuade school boards to reject nonrenewal recommendations, and it has enjoyed some success in these informal meetings.

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[3] In this paper, we use the generic term "nontenured" teacher to identify that category of beginning teachers in each state who have not yet completed their probationary period and thus have not acquired this substantive job protection.

[4] Three states, however, have enacted statutes that provide "just cause" protection for beginning teachers: Iowa, Pennsylvania, and Oklahoma. Citations to the pertinent statutes are set forth in the accompanying chart.

[5] If the school district attempts to fire the nontenured teacher *during the school year*, however, then it generally must have "just cause" and must provide the teacher with full procedural due process.

2. Mandatory Performance Evaluations and Plans of Improvement

Unfortunately, many beginning teachers are not fully prepared for the rigors of the classroom. More than one-quarter (27 percent) of new teachers enter the profession without having fully met state licensing requirements: some 12 percent enter unlicensed, and another 15 percent are hired on emergency, temporary, or provisional licenses.[6]

Recognizing the importance of teacher quality and facing a teacher shortage, many states are now doing more to provide probationary teachers with the supervision and resources they need to succeed. Fully 42 states require local school districts to conduct formal performance appraisals or job evaluations of beginning teachers. Of those, another 20 states also require that, if the evaluation identifies teaching deficiencies, then the school must devise a plan for improving those skills. Depending on the particular state, this "plan of improvement" can include mentoring, peer assistance, professional development, and other forms of assistance. The states that mandate such plans of improvement for teachers in need of assistance are: Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Washington, and West Virginia.

Another 14 states have put real teeth into their evaluation requirements by providing that, if a school district fails to follow the evaluation and/or remediation mandates, then the district cannot refuse to renew the teacher's contract because of alleged teaching deficiencies. Those states are: Arkansas, Delaware, Idaho, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia.

The importance of this sort of job protection cannot be over emphasized. Unlike the "limited due process" described above -- where the nontenured teacher is told too late why he/she is not going to be renewed -- the evaluation/remediation requirement puts the teacher on notice of areas of needed improvement and provides the teacher with the resources necessary to improve and succeed. If more states would implement these practices, great strides could be made in enhancing teacher quality.

3. Collective Bargaining for Substantive Job Rights

NEA staff also determined whether local unions can bargain for the inclusion of *substantive* job protections for nontenured teachers in collective bargaining agreements. In some 22 states, collective bargaining representatives have the authority to negotiate "just cause" protections for beginning teachers that can include more formal due process procedures. In 11 states, that issue is a prohibited subject of bargaining, and in four states the question is unclear. Fifteen states have no bargaining law for public school employees, although in four of those states, some school boards engage in collective bargaining without a bargaining statute.

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[6] National Commission on Teaching & America's Future (NCTAF), "What Matters Most: Teaching for America's Future," September 1996, cited at http://www.nea.org/teaching/quality/facts.html.

Conclusion

Not surprisingly, the NEA study of legal protections for nontenured teachers whose probationary teaching contracts are not renewed revealed a remarkable hodgepodge of state statutes ranging from no protection whatever to substantial job protection in the form of both procedural and substantive rights. While the limited due process rights afforded by some states – a statement of the reasons for the nonrenewal and the opportunity for a meeting – may be of some benefit to the dismissed teacher, far more valuable are state laws that mandate the regular evaluation of beginning teachers and afford the teacher the opportunity *and resources* to correct any deficiencies. The implementation of such an evaluation and remediation system in every state – through state legislation, local board policy, or collective bargaining – will greatly enhance teacher quality and, in the process, promote teacher retention and benefit the cause of public education.

National Education Association
Office of General Counsel
September 2001

Employment Rights of Nontenured Teachers (K-12) by State

State	**Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?**	**Are NTTs who are nonrenewed entitled to meet with the decisionmaker?**	**Are schools required to evaluate NTTs?**	**In addition to an evaluation, must the school also provide:**		**Is properly evaluating the teacher a precondition to nonrenewal?**	**Can the union bargain just cause protection for nontenured teachers**[1]
				Time to improve?	**A plan of Improvement?**		
Alabama *A.C. §*	No[2]	No[3]	No[4]	No	No	No	Nonbargaining state
Alaska *A.S. §*	**Yes** - Upon request §14.20.175(a)	**Yes** - School board §14.20.175(a)	**Yes** §14.20.149(b)	No	**Yes** §14.20.149	No §14.20.175(a)	Permissive
Arizona *A.R.S. §*	**Yes** §15-536	No	**Yes** §15-537	**Yes** - 90 days §§15-536,538	No	No	Nonbargaining state
Arkansas *A.C.Ann. §*	**Yes** §6-17-1506	**Yes** - School board §§6-17-1509,1510	**Yes** §6-17-1504	No	**Yes** §6-17-1504[5]	**Yes** §§6-17-1503-1510	Permissive
California C.Ed.C.§	No	No	**Yes** §44664	No	No	No	Prohibited
Colorado *C.R.S. §*	**Yes** §22-63-203(4)	No	**Yes** §22-9-106	No	**Yes** §22-9-106	No[6]	Nonbargaining state but some school boards bargain without a statute.

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* The NEA Office of General Counsel wishes to acknowledge the invaluable assistance of Kris Romero, third-year law student at George Mason University Law School, in the preparation of this document.

[1] This column addresses the question whether, under state law, the bargaining representative for public school employees can bargain "just cause" protection for nontenured teachers in connection with nonrenewal decisions. Such an issue is either a permissive, prohibited, or mandatory subject of bargaining. States where public school employees have no right to engage in collective bargaining are identified as a "nonbargaining state."

[2] Lee v. Ozark City Bd. of Educ., 517 F. Supp. 686 (M.D. Ala. 1981) ("As a general principle, the school board may elect not to re-employ such a probationary teacher for any reason or for no reason.").

[3] James v. Bd. of Sch. Comm'rs, 484 F. Supp. 705 (S.D. Ala. 1979) (allowing school boards to nonrenew a probationary contract without any type of hearing).

[4] If a school board adopts an evaluation policy for nontenured teachers, the school board must follow its own policy. Alabama Code §16-1-30; Belcher v. Jefferson County Bd. of Educ., 474 So.2d 1063 (Ala. 1985). No policy can change the at-will status of nontenured teachers, however.

[5] According to § 6-17-1504 of the Arkansas Code, if a supervisor "believes or has reason to believe" that a teacher might not be renewed, the supervisor must inform the teacher in writing and "shall document the efforts which have been undertaken to assist the teacher to correct whatever appears to be the cause for potential termination or nonrenewal." Ark. Code Ann. § 6-17-1504.

[6] Axtell v. Park Sch. Dist. R-3, 962 P.2d 319 (Colo. App. 1998) (deciding that an improperly evaluated nontenured teacher cannot bring suit; the Evaluation Act neither created a right to sue nor became a contract term).

State	Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?	Are NTTs who are nonrenewed entitled to meet with the decisionmaker?	Are schools required to evaluate NTTs?	In addition to an evaluation, must the school also provide:		Is properly evaluating the teacher a precondition to nonrenewal?	Can the union bargain just cause protection for nontenured teachers[1]
				Time to Improve?	A plan of Improvement?		
Connecticut *C Gen S§*	**Yes** §10-151(c)	**Yes** - School board[7] §10-151(c)	**Yes** §10-151(b)	No	No	No	Prohibited
Delaware *Del.C*	**Yes** - Upon request 14 Del. C. §1410(b)	**Yes** Superintendent 14 Del. C. §1410(b)	**Yes** 14 Del. C.§1270	**Yes** - "time to correct" if dismissed for poor performance 14 Del. C. §1410[8]	**Yes** - If dismissed for poor performance 14 Del. C. §1410[9]	Yes[10]	Permissive
Fed. Ed. Ass'n[11] *U.S.C. §*	No	No	**Yes** §§4301-14	No	No	No	Prohibited
Florida *F.S. §*	No	No	**Yes** §231.29(3)	Yes[12]	**Yes** §231.29(3)	No	Prohibited
Georgia *O.C.G.A.§*	**Yes** - Upon request §20-2-211	No	**Yes** §20-2-210	No	**Yes** §20-2-210	No	Nonbargaining state
Hawaii (HSTA) *H.R.S. §*	Not by statute, but by collective bargaining agreement	Not by statute, but by collective bargaining agreement	**Yes** §302A-638	No	No	Not by statute, but reinstatement can be proper remedy in arbitration.[13]	Mandatory

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[7] The school board need not provide a meeting if the nonrenewal reason is "either elimination of a position or loss of position to another teacher." Conn. Gen. Stat. § 10-151(c). Also, the teacher may choose a hearing before an impartial hearing officer or panel instead. Id.

[8] The statute requires: "The board will provide such reason(s) in writing and a copy of this chapter no later than 5 days after receipt of such a request, provided that the stated reason(s) must have either been contained in the teacher's performance appraisal, and the teacher was provided time to correct any deficiency through an individualized improvement plan or other documented materials properly placed in the teacher's personnel file prior to said notice." Del. Code 14 § 1410.

[9] Id.

[10] A nontenured teacher must be renewed if the notice of nonrenewal does not conform with 14 § 1410. Boyce v. Alexis I. Du Pont Sch. Dist., 341 F. Supp. 678 (D. Del. 1972).

[11] The Federal Education Association is the NEA affiliate that represents American teachers in Stateside and Overseas Dependents Schools operated by the U. S. Department of Defense. The employment rights of these teachers are controlled by federal law, and the statutory references are to the United States Code.

[12] "[W]ithin a prescribed period of time." § 231.29(3)(d)

[13] Letter from Donald R. Nugent, Assistant Superintendent of Hawaii Schools, to Joan Lee Husted, Director of Programs, Hawaii State Teachers Association (Apr. 12, 1989) ("The parties have mutually agreed to certain procedural requirements which must be complied with prior to the act of nonrenewal.").

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State	Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?	Are NTTs who are nonrenewed entitled to meet with the decisionmaker?	Are schools required to evaluate NTTs?	In addition to an evaluation, must the school also provide:		Is properly evaluating the teacher a precondition to nonrenewal?	Can the union bargain just cause protection for nontenured teachers[1]
				Time to Improve?	A plan of Improvement?		
Idaho *I.C. §*	**Yes** §33-514(3)[14]	**Yes** - Review by Bd. of Trustees, but see footnote.[15] §33-514(3)	**Yes** §33-514(5)[16]	**Yes** - At least 8 weeks, but see footnote.[17] §33-514(3)	Conditions of probation must be specified. §33-514(3)	**Yes** 33-514(5)[18]	Permissive
Illinois *I.C.S.*	**Yes** - Only in last year of prob. period 105 §5/24-11	No	**Yes** 105 §5/24A-8	No	No	No, but teacher can recover damages.[19]	Prohibited
Indiana *I.C. §*	**Yes** - Upon request §20-6.1-4-14	**Yes** - Governing body or superintendent; 20-6.1-4-14	**Yes** §20-6.1-4-14	No	No	**Yes** §20.6.1-4-14[20]	Permissive
Iowa *I.C. §*	**Yes** §279.15	**Yes** - School board 279.15	**Yes** §279.14[21]	No	No	Open question	Permissive
Kansas *K.S.A. §*	Rarely[22] §72-5446	Rarely[23] §72-5446	**Yes** §72-9003	No	No	No	Permissive

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[14] Nontenured teachers hired on "category 2 and 3" contracts (*i.e.*, typically teachers in their second and third years of employment), and teachers in the first year of employment hired on "category 2" contracts, have the right to a statement of reasons. Teachers on "category 1" contracts (*i.e.*, teachers new to the district and hired after August 1 on a limited contract), however, do not have the right to a statement of reasons. Idaho Code § 33-514A and 33-514(3)(a).

[15] This right is available only to "category 3" teachers, which includes teachers in the third year of employment with the school district, as well as certain other experienced teachers. Idaho Code § 33-514(4).

[16] The evaluation requirement applies only to "category 2 and 3" teachers, and not to teachers hired on limited contracts under category 1.

[17] Only category 3 teachers enjoy the right to a probationary period after a poor evaluation and an informal review by the board of trustees. Other nontenured teachers receive the lesser protections of a statement of the reasons for the nonrenewal and "support in the areas of administrative and supervisory support, mentoring, peer assistance and professional development." Id. § 33-514(2).

[18] Yes as to Category 2 and 3 teachers, but no as to category 1 teachers. See, e.g., Rhoades v. Bd. of Trustees, 965 P.2d 187 (Idaho 1998) (holding that, if the process specified in § 33-514 for nonrenewal is not followed, the teacher must be treated as if her contract were renewed).

[19] In Illinois, evaluation procedures are permissive subjects of bargaining; a nontenured teacher who is dismissed in violation of bargained procedures may request arbitration. The arbitrator may not grant reemployment, however, rather the employee's remedy is limited to damages. Illinois Educ. Ass'n v. Bd. of Educ.; 340 N.E.2d 7 (Ill. 1975); Bd. Of Educ. of Community High School Dist. No. 155 v. IELRB, 617 N.E.2d 269 (Ill. App. 1993).

[20] Indiana's statute provides a teacher with certain evaluation and procedural rights that "shall be strictly construed." Ind. Code § 20-6.1-4-14.

[21] Section 279.14 of the Iowa Code requires that the board "establish evaluation criterion and shall implement evaluation procedures." According to the Iowa State Education Association, all local bargaining units have bargained evaluation requirements for nontenured teachers in their collective bargaining agreements.

[22] If a nontenured Kansas teacher alleges that he/she was nonrenewed in retaliation for exercising a constitutional right, he/she may present his claim to a hearing officer. Kan. Stat. Ann. § 72-5446. If the hearing officer finds "substantial evidence" to support the teacher's claim, the board then must provide the hearing officer with the reasons for the nonrenewal, supported by "substantial evidence," in order for the hearing officer to uphold the nonrenewal. Id.

[23] Id.

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State	Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?	Are NTTs who are nonrenewed entitled to meet with the decisionmaker?	Are schools required to evaluate NTTs?	In addition to an evaluation, must the school also provide:		Is properly evaluating the teacher a precondition to nonrenewal?	Can the union bargain just cause protection for nontenured teachers[1]
				Time to Improve?	A plan of Improvement?		
Kentucky *K.R.S.A. §*	**Yes** - Upon request §161.750	No	**Yes** §156.557[24]	No	**Yes** §156.557(3)	**Yes** - Limited rights if reason for non-renewal is poor performance[25]	Nonbargaining state, but some school boards bargain without a statute
Louisiana *L.R.S.A. §*	**Yes** §17:442	No	**Yes** §17:3902	**Yes** - NTT must receive "expected timeline" §17:3902	**Yes** §17:3902	**Yes**, by state rule[26]	Nonbargaining state, but some school boards bargain without a statute
Maine *M.R.S.A. §*	No	No	**Yes** 5 §4575	No	No	No	Prohibited
Maryland *M.C.A. §*	No	No	**Yes** - By regulation M.R.C. ttl 13A, §§04.01-04	No	No	No[27]	Prohibited
Massachusetts *M.G.L. §*	No 71 §41	No 71 §41	**Yes** 71 §s8	No	No	No	Unclear[28]

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[24] This Kentucky statute requires the state board of education to establish regulations for teacher evaluations. Under the applicable regulation, nontenured teachers must be evaluated at least once a year. 704 Ky. Admin. Reg. 3:345 §4(2)(e).

[25] Kentucky requires each school board to establish an evaluation appeals panel, and this panel reviews any evaluations that teachers appeal as unfair. Ky. Rev. Stat. §156.101. Kentucky's supreme court has ruled that a nontenured teacher cannot be dismissed for unsatisfactory performance before getting "the opportunity to dispute the findings in the evaluation." Thompson v. Bd. of Educ. of Henderson County, 838 S.W.2d 390, 393-94 (Ky. 1992). The court ordered the school to rehire the teacher until the appeals panel decided the appeal; if the appeals panel agreed with the teacher, then his dismissal would be an illegal "arbitrary nonrenewal" and his employment must continue, unless the superintended refused to renew "for other reasons unrelated to the teacher's evaluation." Id.

[26] See La. Dept. of Educ. Bulletin 1495, § XI, pp. 18-24.

[27] See, e.g. Bd. of Sch. Comm'rs v. James, 625 A.2d 361 (Md. App. 1993) (holding that school board could dismiss a *tenured* teacher for incompetency even though evaluation procedures were not precisely followed); Bd. of Educ. of Anne Arundel County v. Barbano, 411 A.2d 124 (Md. App. 1980) (deciding that a board could nonrenew a nontenured teacher whose evaluation did not comply with the district's guidelines because the guidelines were not intended to give teachers procedural protection). But see Bd. of Educ. of Baltimore County v. Ballard, 507 A.2d 192 (Md. App. 1986) (school district could not dismiss tenured librarian for incompetency where she was not evaluated properly).

[28] Massachusetts amended its education statutes in 1993 and classified nontenured teachers as employees at will. The courts have not yet ruled on whether this statute prohibits the bargaining of additional job protection for nontenured teachers.

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State	Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?	Are NTTs who are nonrenewed entitled to meet with the decisionmaker?	Are schools required to evaluate NTTs?	In addition to an evaluation, must the school also provide:		Is properly evaluating the teacher a precondition to nonrenewal?	Can the union bargain just cause protection for nontenured teachers[1]
				Time to Improve?	A plan of Improvement?		
Michigan *M.C.L. §*	No[29]	No	**Yes** §38.83a	No	**Yes** §38.83a	**Yes** - Proves that work is satisfactory §38.83a	Permissive
Minnesota *M.S. §*	**Yes** - Upon request §122A.40(5)[30]	No	**Yes** §122A.40(5)	No	No	No	Untested; permissive
Mississippi *M.C.A. §*	**Yes** - Upon request §§37-9-105, 109[31]	**Yes** - Board or hearing officer §§37-9-109, 113	No	No	No	No	Nonbargaining state
Missouri M.R.S. §	**Yes** §168.126.2	No	**Yes** §168.128	**Yes** - If work is poor, teacher entitled to 90 days notice. §168.126	No	No §168.126.2	Nonbargaining state
Montana	Untested	No	No	No	No	No	**Yes**[32]
Nebraska *N.R.S. §*	**Yes** - Upon request §79-828(3)	**Yes** - School board §79-828(4)	**Yes** §79-828(2)	No	**Yes** §79-828(2)	**Yes**[33]	Unclear
Nevada *N.R.S. §*	**Yes** §391.3197(5)	No	**Yes** §391.3125(3)	**Yes** - §391.3125, §391.313	**Yes** §391.3125[34]	Unclear[35]	Permissive

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[29] A Michigan probationary teacher must receive written notification of unsatisfactory performance 60 days before the end of the school year, but the notice need not include any reasons. Mich. Comp. Laws § 38.83.

[30] There is one exception: nontenured teachers employed in Minneapolis, St. Paul, and Duluth do not have a right to a statement of reasons for nonrenewal. Minn. Stat. § 122A.41

[31] The Mississippi statutory structure is unusual. Mississippi law provides no tenure to any teacher, and both state and federal courts have ruled that teachers have no property right in their employment for due process purposes. This means that a school district never needs to demonstrate good cause for nonrenewal, even for veteran teachers. See Pruett v. Dumas, 914 F. Supp. 133, 137 (N.D. Miss. 1996) ("The Mississippi statutes relevant to this question provide that the school administrators do not need to demonstrate good cause in justifying a decision not to renew a teacher's contract.") affirm'd without opinion, 98 F.3d 1339 (5th Cir. 1996); Calhoun County Bd. of Educ. v. Hamblin, 360 So.2d 1236 (Miss. 1978) ("the Legislature did not intend to, and did not, create by such statutes a system of tenure.").

[32] See Poplar Educ. Ass'n. v. Poplar Public Schs., BPA 23-99, at 24 (Grenig 1999) (language in collective bargaining agreement requiring school district to have "just cause" to terminate or "deprive" any "teacher" of a "professional advantage" interpreted to mean that school district must have just cause to nonrenew a nontenured teacher; teacher awarded reinstatement with backpay).

[33] See Cox v. York County Sch. Dist. No. 083, 560 N.W.2d 138 (Neb. 1997) (affirming the reinstatement of nontenured teacher because school district violated statutory requirement that probationary teachers be evaluated at least once each semester).

[34] Nevada law requires that the probationary teacher either receive an admonition explaining problems in her performance or other notice by March 1. Nev. Rev. Stat. § 391.3125(4). Emphasizing the time requirement, the Nevada Supreme Court has decided that the statute was intended to provide teachers who have not received an admonition with both "notice of a potential decision not to reemploy" and a chance to improve. McCrackin v. Elko County Sch. Dist., 747 P.2d 1373, 1357 (Nev. 1987). For that reason, a principal's notice of potential nonrenewal that met the timing requirements, but indicated that the nonrenewal decision had already been made, violated the statute. Id. The case was remanded to a lower court for the award of an appropriate remedy. Id.

[35] Id.

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State	Are nontenured teachers (NTTs) entitled to know reasons for their nonrenewal?	Are NTTs who are nonrenewed entitled to meet with the decisionmaker?	Are schools required to evaluate NTTs?	In addition to an evaluation, must the school also provide:		Is properly evaluating the teacher a precondition to nonrenewal?	Can the union bargain just cause protection for nontenured teachers[1]
				Time to Improve?	A plan of Improvement?		
New Hampshire	No	No	No	No	No	No[36]	Unclear; permissive
New Jersey *N.J.S.A. §*	**Yes** - Upon request §18A:27-3.2	**Yes** - School board (by regulation and case law)[37]	**Yes** §18A:27-3.1	No	**Yes** §18A:27-3.1[38]	No[39]	Prohibited
New Mexico *N.M.S.A. §*	**Yes** - Upon request §22-10-14	No	**Yes** - By regulation	No	No	No	Nonbargaining state
New York *N.Y. Ed.L.§*	**Yes** - Upon request §3031	No; teacher may respond in writing to the Board. §3031	No	No	No	**Yes** - Bargained eval. procedures must be followed before non-renewing.[40]	Prohibited[41]
North Carolina *N.C.G.S. §*	**Yes** - Board must disclose reason in record.[42]	No	**Yes** §115C-333	No	No	No, but it can be evidence of arbitrary and capricious action.	Nonbargaining state
North Dakota *N.D.C.C. §*	**Yes** §15-47-27.1	**Yes** - School board §15-47-27.1	**Yes** §15-47-27.1	No	No	Probably[43]	Untested

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[36] See Appeal of Gaetgens, 125 N.H. 796 (1984) (holding that a school district may legally nonrenew a teacher without providing a warning of poor performance or an improvement period).

[37] See Donaldson v. Bd. of Educ. of the City of N. Wildwood, 320 A.2d 857, 860, 862 (1974) (holding that "a timely request for informal appearance before the board should ordinarily be granted."); N.J. Stat. Ann. § 6:3-4.2 (granting nontenured teachers the right to an "informal appearance" before the school board).

[38] New Jersey requires a conference after each evaluation that should "identify any deficiencies" and "extend assistance for their correction." N.J. Stat. Ann. § 18A:27-3.1.

[39] Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447 (App. Div. 1982).

[40] While New York state law does not require evaluations, most collective bargaining agreements contain such a requirement, and a New York court has held that a school district's violation of the evaluation requirement can be remedied by reinstating the teacher for another year in order to allow for a proper evaluation. In re Candor Central Sch. Dist., 384 N.Y.S.2d 217 (N.Y. App. Div. 1976).

[41] Under In re Cohoes City Sch. Dist., 40 N.Y.2d 774 (1976), any collective bargaining agreement that limits a school board's right to release a teacher when the teacher finishes the probationary period is void as against public policy.

[42] North Carolina law provides some protection for nontenured teachers; they cannot be dismissed for "arbitrary, capricious, discriminatory or for personal or political reasons." N.C. Gen. Stat. §115C-325. In order to ensure that the school board complies with this statute, the courts have required that the administrative record include the reason for nonrenewal. Abell v. Nash County Bd. of Educ., 321 S.E.2d 502 (N.C. App. 1984).

[43] Retzloff v. Grand Forks Sch. Dist., 424 N.W.2d 637 (N.D. 1988) (while §15-47-27.1 "requires" the school district to evaluate a nontenured teacher, "substantial compliance" with the requirement is sufficient).

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				Time to improve?	A plan of Improvement?		
Ohio *ORCA §*	**Yes** - Upon request §3319.11(G)	**Yes** - School board §3319.11(G)	**Yes** §3319.111	No	**Yes** §3319.111 (B)(3)	**Yes** §3319.11(G)(7)[44]	Mandatory
Oklahoma *OS §*	**Yes** 70 §6-101.26	**Yes** - School board 70 §6-101.26	**Yes** 70 §6-101.10	**Yes** - Two months or less 70 §6-101.24	**Yes** 70§6-101.24	**Yes** 70 §6-101.24	Prohibited
Oregon *ORS §*	**Yes** - Upon request §342.835	**Yes** - School board §342.835	**Yes** §342.850	No	**Yes** §342.850	No	Mandatory
Pennsylvania *PS §*	**Yes** 24 §§1108, 1127[45]	**Yes** - School board 2 §§101-06; 2 §§701-54[46]	**Yes** 24 §§1108, 1123	No	No	**Yes** 24 §1108[47]	Mandatory
Rhode Island *RIGL §*	**Yes** - Upon request §§16-13-2, 13-4[48]	**Yes** - School board §§16-13-2, 13-3, 13-4	No	No	No	No	Permissive
South Carolina *SCCA §*	No	**Yes** - Certain NTTs can meet with superintendent §59-26-40[49]	**Yes** §59-26-30(B)[50]	No	**Yes** §59-26-30(B)	No	Nonbargaining state
South Dakota *SDCL §*	No	No	No	No	No	No	Unclear; mandatory or permissive

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[44] See, e.g., Snyder v. Mendon-Union Local Sch. Dist. Bd. of Educ., 661 N.E.2d 717 (Ohio 1996) (school board cannot nonrenew a teacher if it has not complied with the evaluation statute).

[45] The notice of nonrenewal must include a written statement of reasons or, if the dismissal is for unsatisfactory performance, then the nontenured teacher must have received an unsatisfactory evaluation. 24 Pa. Cons. Stat. §§ 1108, 1127.

[46] In Pennsylvania, nontenured teachers have most of the same rights as tenured teachers, including the right to be dismissed or nonrenewed only for "cause." The statutory sources of these rights differ: A nontenured teacher's right to a hearing stems from its Local Agency Law; a decision not to renew is treated as an agency adjudication that requires an opportunity for a hearing and judicial review. 2 Pa. Cons. Stat. §§ 101-06, 701-54. In contrast, tenured teachers' rights stem from the School Code. 24 Pa. Stat. §§ 11-1127, 1131-32.

[47] See George v. Union Area Sch. Dist., 350 A.2d 918 (Pa. Commw. Ct. 1976) (nontenured teacher can be dismissed only after an unsatisfactory rating; teacher entitled to reinstatement with back pay); Kearns v. Lower Merion Sch. Dist., 346 A.2d 875 (Pa. Commw. Ct. 1975) (holding that nontenured teachers could not have more protection than tenured teachers and making the statutory reasons to dismissal tenured teachers equally applicable to nontenured employees).

[48] The stated reasons relied on to justify nonrenewal can be quite insubstantial. See, e.g., Kagan v. Rhode Island Bd. of Regents for Elem. And Secondary Educ. (R.I. Sup. Ct. 1997) (allowing a superintendent's belief that "there were 'more qualified teachers' available" to serve as the statutorily required reason)

[49] This statute applies only to "annual contract teachers", and not to teachers who are in their first or "induction" year or who have a "provisional contract" (a one-year contract for a teacher who has completed his induction period but is "not ready" for an annual contract.) S.C. Code Ann. § 59-26-40

[50] The South Carolina statute requires the state board of education to develop evaluation regulations. S.C. Code Ann. § 59-26-30. The regulations establish annual evaluations and improvement plans when needed for first year teachers ("induction contract teachers") and second year teachers ("annual contract teachers.") 43 S.C. Code Ann. Regs. 205.1

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				Time to Improve?	A plan of Improvement?		
Tennessee *T.C.A. §*	No	No	**Yes** §49-5-5205	No	**Yes** §49-5-5205	No §49-5-5205(e)	Unclear; mandatory or permissive
Texas *T. Ed. C.A. §*	No	**Yes** - Certain NTTs receive a hearing before the board.[51] §§21.205-209	**Yes** §21.203, §21.352	No	No[52]	**Yes** - At least §21.203 must be followed before nonrenewal.[53]	Nonbargaining state
Utah *U.C.A. §*	No	No	**Yes** §53A-10-104	No	**Yes** §53A-10-107	No	Nonbargaining state, but some school boards bargain without a statute.
Vermont *V.S.A. §*	**Yes** 16 §1752	**Yes** - Board 16 §1752	No, but if board doesn't evaluate properly, nonrenewal must be for "just-cause."[54] 16 §1752	No	No	No, but if board doesn't evaluate properly, nonrenewal must be for "just cause."[55] 16 §1752	Mandatory

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[51] Texas offers three types of contracts: continuing, term, and probationary. Probationary contracts cover all teachers new to a school district. A first-year teacher can be renewed at the board's discretion for "two additional one-year periods." Tex. Educ. Code Ann. § 21.209. Probationary teachers have no procedural protection from nonrenewal, as long as the board gives notice within a certain time frame. Id. After probation, a teacher will be placed on either a term or continuing contract, depending on the school district. Term contract teachers do have a right to a hearing. Id. §§ 21.206-207. Only a few Texas school districts offer continuing contracts, which afford teachers "just cause" protection.

[52] Texas state regulations provide that a growth plan must be implemented under some circumstances, but it is a not a prerequisite for nonrenewal. Title 19 Tex. Admin. Code § 150.1004.

[53] Texas teacher evaluation procedures are established in two sections, and a violation of each section might be treated differently. Texas law provides that a nontenured teacher's required annual evaluation "shall be considered by the board of trustees" before the board decides not to renew the contract. Tex. Educ. Code Ann. § 21.203. Citing this section, a Texas appellate court has ordered a school district to rehire a nontenured teacher because the board did not review her evaluations before making its decision. Wilmer-Hutchins Indep. Sch. Dist. v. Brown, 912 S.W.2d 848 (Tex. App. 1995). The remedy for a violation of § 21.352, which affects the type of evaluation system used and provides an opportunity for the teacher to review or rebut the evaluation, might vary. Although small technical violations of these provisions would not automatically overturn a nonrenewal, more serious breaches of the procedure, particularly if the evaluation was the primary reason for nonrenewal, could support reinstatement.

[54] In Vermont, a nontenured teacher can be nonrenewed for any reason unless the teacher has not received two written evaluations each nontenured year. If the evaluation requirements are not met, then the school board can only dismiss for "just and sufficient cause. Vt. Stat. Ann. Tit.16 §1752.

[55] Id.

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				Time to Improve?	A plan of Improvement?		
Virginia *V.C.A. §*	**Yes** - Upon request §22.1-305	**Yes** - Superintendent or designee §22.1-305	**Yes** §22.1-303	No	No	No	Nonbargaining state
Washington *W.R.C. §*	**Yes** §28A.405.220	**Yes** - Superintendent §28A.405.220	**Yes** §28A.405.100	**Yes** §28A.405.100	**Yes** §28A.405.100	No	Unclear; probably mandatory
West Virginia *W.V.C. §*	**Yes** - Upon request §18A-2-8a	**Yes** - School board §18A-2-8a	**Yes** §18A-2-12[56]	**Yes** §18A-2-12	**Yes** §18A-2-12	Yes[57]	Nonbargaining state
Wisconsin *W.S. §*	**Yes**[58]	**Yes** - School board §118.22	No[59]	No	No	No	Mandatory
Wyoming *W.S.A. §*	**Yes** §21-7-105	No	**Yes** §21-3-110 (a)(xvii)	No	No	No[60]	Prohibited[61]

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[56] A West Virginia statute instructs the state board of education to design an evaluation system that must provide an unsatisfactory teacher with time for improvement and an improvement plan. W. Va. Code § 18A-2-12. The rules implementing this statute provide each nontenured teacher with two written evaluations per year. W. Va. Code St. R. tit. 126, §142-10.

[57] See Wren v. McDowell County Bd. of Educ., 327 S.E.2d 464 (W. Va. 1985) (holding that school psychologist (who is subject to same evaluation process as teachers) could not be nonrenewed because he was not provided the required time to improve).

[58] Not by statute, but by decision of the state labor commission. Boscobel Area School Dist. (Decision No. 18891-A) (1982).

[59] Although not required by statute, teacher evaluation is a permissive subject of bargaining and is covered by most collective bargaining agreements in the state.

[60] Leonard v. Converse County Sch. Dist., 788 P.2d 1119, 1121 (Wyo. 1990) ("The evaluation rules did not protect initial contract teachers from dismissal because, as teachers without tenure, they could be dismissed even after receiving favorable evaluations.").

[61] While Wyoming is a non-bargaining state, some bargaining without a statute does occur. Under a state supreme court decision, however, local boards may not "abrogate its statutory authority" to nonrenew nontenured teachers for any reason, either by contract, policy, or regulation. Leonard v. Converse County Sch. Dist., 788 P.2d 1119, 1122 (Wyo. 1990).

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II. THE RIGHTS OF NONTENURED TEACHERS -- THE NEW, "CLASS OF ONE" EQUAL PROTECTION THEORY

The Theory:

Under an emerging theory of constitutional law, a nontenured teacher (or any other school employee, for that matter) can challenge a nonrenewal or dismissal decision on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment[1] if the plaintiff can show: (1) that the employer *intentionally* treated him or her differently from other similarly situated employees (*e.g.*, other competent teachers), and (2) that the difference in treatment had "no rational basis" or was "arbitrary" (*e.g.*, was based on personal animosity or "sheer vindictiveness" rather than legitimate educational grounds or personnel needs).

- The plaintiff does not have to show that he/she belongs to a suspect class (racial minority) or a quasi-suspect class (female) or even to any class at all; the Equal Protection Clause affords protection even to a class-of-one person;

- The plaintiff does not have to show that the adverse employment action was taken in retaliation for engaging in constitutionally protected conduct (*e.g.*, free speech activities); and

- The Plaintiff does not have to show that he/she has a protected property interest in his/her job (*e.g.*, that he or she enjoyed tenure or some other substantive right to continued employment in the absence of "just cause").

The Case Authority:

1. Village of Willowbrook v. Olech, 120 S. Ct. 1073, __ U.S. __ (2000) (in order to make out an Equal Protection claim, a plaintiff need not show that he/she is a member of a suspect or quasi-suspect class. "Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one.'" Plaintiff need only allege "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," *i.e.*, that the discriminatory treatment is "intentional and arbitrary."

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[1] The Equal Protection Clause provides, in pertinent part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

- What constitutes proof that the government official's action lacks a "rational basis" or is "arbitrary"?

  A number of lower federal courts have found the following allegations of improper motive on the part of the government official or public employer to sufficiently allege that the official or employer lacked a "rational basis" for the adverse action:

  - "a powerful public official picked on a person out of sheer vindictiveness" (Esmail);
  - the official was motivated by "totally illegitimate animus toward the plaintiff by the defendant" (Hilton);
  - university officials were motivated by "sheer vindictiveness" (Levenstein);
  - an official's "spiteful effort to 'get' [the plaintiff]" (Forseth);
  - "based upon [the school employer's] sheer vindictiveness or spite" (Singleton);
  - the defendants "maliciously singled [plaintiff] out with the intent to injure him" (Thomas);
  - college officials motivated by "malicious intent to injure" (Vanderhurst);
  - school officials motivated by the employee's "sexual orientation" (Glover and Weaver).

2. Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995) (Posner, J.) (denial of liquor license because of mayor's "deep-seated animosity" toward plaintiff is "wholly unrelated to any legitimate state objective" and therefore violates Equal Protection Clause; that Clause protects, not only "members of identifiable groups," but also "a class of one" individual; "the charge here is that a powerful public official picked on a person out of sheer vindictiveness," and that is sufficient to state an Equal Protection claim)

3. Hilton v. Wheeling, 209 F.3d 1005 (7th Cir. 2000) (in its first post-Olech Equal Protection case, Seventh Circuit reaffirms its holding in Esmail that, to state an Equal Protection claim, plaintiff must allege (1) that the government official had "no rational basis" for the discriminatory action and (2) that the official was motivated by "reasons of a personal nature unrelated to the duties of the defendant's position" or by "totally illegitimate animus toward the plaintiff by the defendant")

4. Levenstein v. Salafsky, 164 F.3d 345 (7th Cir. 1998) (allegation that university employee's suspension and constructive discharge were prompted by university officials' "sheer vindictiveness" (rather than students' sexual harassment complaints) states Equal Protection claim; this "class of one" Equal Protection claim is a "clearly established" constitutional right such that university officials sued in their *individual* capacities are not entitled to qualified immunity)

5. Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000) (pre-Olech) (plaintiff's allegation that government official's conduct was a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective" states Equal Protection claim)

6. Smith v. Eastern New Mexico Medical Center, 72 F.3d 138, 1995 WL 749712 (10th Cir. 1995) (unpublished disposition) (Equal Protection Clause protects, not only those discriminated against in suspect or quasi-suspect classes, but also individuals not in a suspect class who are targets of "intentional or purposeful discrimination" (*citing* Buckley Constr., Inc. v. Shawnee Civic & Cultural Development Auth., 933 F.2d 853 (10th Cir. 1991)

7. Zeigler v. Jackson, 638 F.2d 776 (5th Cir. 1981) (also binding in the Eleventh Circuit) (allegation by public employee that he was dismissed for alleged misconduct, when other employees who engaged in similar misconduct were retained, states valid Equal Protection Claim; public employer's differential treatment of similarly-situated public employees without a "rational justification" violates Equal Protection Clause of the Fourteenth Amendment)

8. Batra v. Board of Regents of University of Nebraska, 79 F.3d 717 (8th Cir. 1996) (adopting Esmail rationale to denial of tenure claim, but ruling in favor of university on facts of the case; to make out an Equal Protection claim, the plaintiff need only show "intentional" discrimination and "arbitrary or irrational state action;" plaintiff does not have to show that he belongs to a suspect class or was punished for exercising "fundamental right," or that he enjoyed a protected property interest in continued employment)

9. Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp. 2d 1297 (D. Colo. 1998), *aff'd on other grounds*, 208 F.3d 908 (10th Cir. 2000)(in university professor's challenge to dismissal based on in-class comments, district court recognizes "class of one" Equal Protection claim based on allegation in the complaint that defendants "intentionally and vindictively carried out a campaign" to secure plaintiff's discharge; plaintiff need only allege "intentional or purposeful discrimination" and "bad faith or malicious intent to injure")

10. Singleton v. Chicago School Reform Board of Trustees, 2000 WL 777925 (N.D. Ill. 2000) (to make out an Equal Protection claim, public school teacher challenging her termination must allege that the adverse action was: "(1) based upon sheer vindictiveness or spite; and (2) wholly unrelated to any legitimate state objective." Here, plaintiff's complaint is sufficient to defeat Motion to Dismiss; she alleged that her termination was a pretext to hide unlawful retaliation for complaining about sexual harassment)

11. Allan v. Board of Trustees, ___ F. Supp.2d ___, 2000 WL 429253 (D.N.J. 2000) (recognizing school employee's Equal Protection claim under Olech; employee must show that his treatment was "intentional, arbitrary, and irrational"; here, university's interpretation of state statute to deny to plaintiff employment credit for military service was wholly rational in light of pertinent court decisions construing statute)

12. Byers v. Illinois State Police, 2000 WL 1741723 (N.D. Ill. 2000) (public employees claiming that they were denied promotions in retaliation for filing EEOC charges of sex discrimination state a valid Equal Protection claim under Olech)

13. Phelan v. City of Chicago, 125 F. Supp. 2d 870, 876, n. 5 (N.D. Ill. 2000) (to make out "class-of-one" Equal Protection claim, plaintiff challenging his discharge from public employment must show that defendant acted pursuant to "reasons 'of a personal nature' unrelated to the duties of the defendant's position.... This must entail 'vindictive action' which requires proof of a 'totally illegitimate animus' toward the plaintiff by the defendant"; here, plaintiff's allegation that he was fired because of his indictment for mail fraud fails to meet this test)

14. Kevin v. Thompson, ___ F. Supp. 2d ___, 2000 WL 549440 (N.D. Ill. 2000) (to state Equal Protection claim under Olech, plaintiff must allege both that defendant's action was "irrational" and that it was motivated by "vindictiveness or illegitimate animus toward the plaintiff")

15. Thomas v. City of West Haven, 734 A.2d 535, 249 Conn. 385 (1999) (pre-Olech decision explicitly adopting Esmail analysis of "class-of-one" Equal Protection claim; plaintiff must demonstrate that the defendants "maliciously singled him out with the intent to injure him")

16. *But see,* Valot v. Southeast Local School District Board of Education, 107 F.3d 1220 (6th Cir. 1997) (rejecting Equal Protection claims of bus drivers not rehired in retaliation for filing unemployment compensation claims; school district's action was rationally related to legitimate state interest in preserving the school's financial resources)

17. *But see,* Pleva v. Norquist, 195 F.3d 905 (7th Cir. 1999) (pre-Olech) (refusing to recognize Equal Protection claim of policymaking employee (zoning board chairman) nonrenewed because of political patronage)

Gay Rights

1. Evans v. Romer, 116 S. Ct. 1620, __ U.S. __, (1996) (an amendment to the Colorado Constitution prohibiting state and local governments, including school districts, from banning discrimination on the basis of sexual orientation imposes "a special disability" on gays and lesbians and was the product of "animosity toward the class of persons affected;" under rational basis test of the Equal Protection clause, "a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest")

2. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (school district's intentional failure to protect gay student from anti-gay harassment perpetrated by his peers violates the Equal Protection Clause)

3. Glover v. Williamsburg Local School Dist., 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (nonrenewal of nontenured teacher because of his sexual orientation violates Equal Protection Clause; an adverse employment action based on a "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose")

4. Weaver v. Nebo School Dist., 29 F. Supp. 1279 (D. Utah 1998) (refusal to rehire lesbian teacher as volleyball coach because of her sexual orientation violates Equal Protection Clause; adverse employment action that is "motivated by irrational fear and prejudice towards homosexuals … cannot survive a rational basis review"; moreover, the "negative reaction" of some parents to the coach's sexual orientation also "is not a proper basis for discriminating against them")

5. Zavatsky v. Anderson, 130 F. Supp. 2d 349 (D. Conn. 2001) (discrimination on basis of sexual orientation (denial of child visitation) violates Equal Protection Clause; individual defendants not entitled to qualified immunity)

6. Quinn v. Nassau County Police Department, 53 F. Supp.2d 347 (E.D.N.Y. 1999) (holding public employer liable under Equal Protection Clause for failing to stop sexual harassment of gay police officer by fellow officers)

7. *See also*, Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) (selective prosecution for DUI on basis of sexual orientation violates Equal Protection Clause)

Other Resources:

1. "'Vindictive-Action' Equal Protection Suits Give Individual Recourse Against Government," 67 U.S.L.W. 2451 (2/9/99) (discussing recent cases)

2. Timothy Zick, "Angry White Males: The Equal Protection Clause and 'Classes of One,'" 89 Ky. L. J. 69 (2000-2001) (complaining that "Olech signals to all disappointed individuals that they have a constitutional claim against their government officials. The door to the federal courthouse ought not be opened so wide.")

3. J. Michael McGuinness, Esq., *Esmail: Equal Protection For Ordinary Victims of Governmental Misconduct*, 10 OCT W. Va. Law. 14 (1996)

4. J. Michael McGuinness, *Equal Protection for NonSuspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 554 PLI/Lit 1013 (November, 1996)

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FACING THE NEW DIVERSITY IN THE SCHOOL HOUSE-- TRANSSEXUALITY

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Facing the New Diversity in the School House--Transsexuality

by
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What happens when the nation's increasing focus on education collides with one of the newest bastions of sexual liberty, transsexuality? How are the rights of the transsexual individual balanced with the effort to maintain a disruption free school setting reconciled?

As the country turns its focus to education—small class size, school choice and vouchers, accountability testing—the pool of available teachers continues to shrink. At the same time, societal acceptance of divergent lifestyles grows. This means that school systems are challenged to accept talented faculty from a wider array of applicants who may not fit traditionally accepted profiles of a teacher. A decade ago it was difficult to find a school system in the country willing to embrace an openly gay or lesbian member of its faculty. Today, however, openly gay and lesbian faculty members are not uncommon in large school districts. In fact, many districts now have stated policies prohibiting discrimination based on sexual orientation. The Alexandria City (VA) Public School Board, for example, recently passed a policy adding sexual orientation as a protected class under their anti-discrimination policy.

Attempting to accept expressions of sexual identity and to become a truly pluralistic society, many organizations and government entities are examining transsexuality in the workplace. Last year, for example, Portland, Oregon; Boulder, Colorado; Madison, Wisconsin; and Atlanta, Georgia all expanded their laws to bar discrimination against transsexuals. The Xerox Corporation, Apple Computer, and Lucent Technologies also cover transsexuals in their anti-discrimination policies. A December 27, 2000 story in The Washington Post described a transsexual administrator in the Baltimore County Schools who recently informed his boss that he was about to undergo surgery to change from Ron to Rhonda.[1] In this situation there is no indication that the administrator had day-to-day contact with children and parents in the system. It is not difficult to imagine, however, that some school system will face this test in the near future. In fact, many school systems have. Regardless of whether it is a transsexual administrator, faculty member, or student many questions are raised. How will the system respond? What is the potential for disruption in the learning environment? How have the courts balanced the rights of the individual with the rights of the employer? What legal theories are tested? What does it really mean to be inclusive in the educational setting? This paper examines the legal debate over transsexual rights.

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[1] Sarah Schafer, More Transsexuals Start New Life, Keep Old Job, THE WASHINGTON POST, December 28, 2000 at A1.

For decades, gender related issues have been a primary topic of discussion and litigation in the workplace environment. Principally, this is because "in our society, we all participate in a gender ideology that holds there are two easily distinguished genders."[2] Unfortunately, reality is not so simple. Despite the attempts of many, including judges and employers, to see things—especially sexual and gender issues--in black and white, they are often shrouded in shades of gray. Transsexuality is one such issue. While most judges and employers consider anatomical birth sex as the fundamental guiding principle in determining appropriate behavior, this could be a crucial oversight. The medical and psychological professions generally accept gender identification as more integral to a person's sex than anatomical birth sex.[3] In other words, most people, including judges, tend to look to a person's external gender identity to determine rights and behavior. On the other hand the medical and psychological community looks beyond the external measure of a person to a deeper internal gender identity. It is the external/internal dichotomy that often raises conflict.

A transsexual is a person who has a sense of discomfort and inappropriateness about his or her birth anatomical gender. This discomfort or inappropriateness is so complete that the transsexual wishes to rid him or herself of their genitals and live life as a member of the opposite gender. Transsexualism is also known in the psychiatric and medical communities as gender dysphoria.[4] The Supreme Court defines a transsexual as "one who has '(a) rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[5] Additionally, others argue that since transsexual or transgendered people identify with the sex opposite that to which they were born, they are by definition gender nonconforming.[6] Transsexuals are often described together with gays, lesbians, and transvestites. This, however, presents a fundamental misunderstanding of all three groups of people. Gays and lesbians raise issues of sexual orientation. Transvestites enjoy dressing as the opposite sex but do not want to become anatomically the opposite sex. Transsexuals are concerned with questions of sexual or gender identity and seek anatomical change.

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[2] Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity, 34 Harv. C.R. –C.L. L. Rev. 329, 339 (1999).

[3] Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392, 394 (2001).

[4] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §302.50 (3rd ed. Rev. 1987).

[5] Farmer v. Brennan, 114 S. Ct. 1970, 1975 (1994) (quoting AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

[6] Anthony E. Varona & Jeffrey Monks, En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation, 7 William & Mary Journal of Women and the Law 1, 89 (Fall 2000).

Increasingly, courts recognize the difference between sexual orientation and gender issues as well as transvestitism.[7] But the courts continue to struggle. The judicial system has "faced great difficulty in conceptualizing claims for employment discrimination by transsexuals."[8] This is partially through a lack of understanding, partially out of fear, and partially out of the very nature of the system. "While the need to classify may be a necessary evil of the legal system, the courts are often guilty of drawing bright lines instead of engaging in an in-depth inquiry."[9]

The medical community looks at several factors to determine a person's sex or gender, including sexual chromosomes, sexual organs, sexual hormones, internal reproductive organs, external genitalia, secondary sexual characteristics, and gender identity (psychological sex). These factors, for most people, are all in sync. This is not the case for the transsexual. The transsexual's factors are generally consistent with each other except gender identity. This is a crucial exception. "Psychologically, the transsexual feels that his or her 'true' gender conflicts with all the biological or genetically related factors."[10] Because of this internal conflict, transsexuals are "fixated, in the manner of monomania, on changing their actual body to agree with their body image, and on living the role of the sex of the body image."[11] The change is easy for neither the transsexual nor society. During the transition process, transsexuals often lose their jobs, are ostracized by their family and friends, face deep questions of guilt, and suffer cruelty from peers and neighbors.[12] Legal problems documenting the change offer new often-unexplored hurdles.[13] It is a long demanding transition process forcing the transsexual to consider several options including physiologically altering hormones, electrolysis, voice therapy, breast reduction or augmentation surgery, hair transplants, hysterectomy, orchiectomy, metaoidioplasty, tracheal shave, and genital alteration surgery. From a judicial perspective, subsequent to the treatments and surgery "the postoperative transsexual has reconciled the biological factors with his or her subjective gender identity, with the crucial exception of the chromosomes."[14] This intense desire to change from one sex or gender to another obviously generates behavior that causes consternation in society, especially the workplace. Notably, most behavior centers on appropriate dress and use of the correct restroom facility. As a result, employers and others often take action that may be discriminatory in nature.

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[7] See, e.g. Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1983), rev'd 742 F. 2d 1081 (7th Cir. 1984), cert. denied 471 U.S. 1017 (1985); Doe v. McConn, 489 F. Supp. 76, (S.D. Tex 1980); Doe v. The Boeing Company, 846 P.2d 531 (1993); Rentos v. OCE-Office Systems, 1996 WL 737215 (S.D.N.Y. 1996).

[8] Rentos at note 6.

[9] Debra Sherman Tedeschi, The Predicament of the Transsexual Prisoner, 5 Temp. Pol. & Civ. Rts L. Rev. 27, 31 (Fall 1995).

[10] Id. at 32.

[11] John Money, Sex Errors of the Body and Related Syndromes 85 (1994).

[12] Notably, transsexuals often meet with objections in generally recognized gender sensitive groups. At the annual Michigan Womyn's Music Festival organizers recently addressed this issue. The Festival, which is in 26th year and is only open to women, in 1999, confronted the transsexual issue when two transsexual males who were in the pre-operative process of becoming women tried to take a shower. The dispute about who was really a woman became very heated. As a result, the organizers, who are normally gender sensitive, decided that the festival was only open to women born women. Teresa Wiltz, XX Marks the Spot, THE WASHINGTON POST, August 16, 2001 at page C2.

[13] Phyllis Randolph Frye, The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They are Allowed to Wear on the Job, Which

The fundamental question is whether transsexuals enjoy any kind of protection from discrimination because of their transsexualism. Most cases have taken the form of actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681, or the Rehabilitation Act of 1973, 29 U.S.C. 794.[15] Some transsexual litigants also have sought refuge in the First Amendment free speech provisions.[16] The most successful litigation, however, from a transsexual perspective is action brought under either a state or local law.

The premier case appeared in 1983, when a federal district court in Illinois held that transsexuals have an action for discrimination under Title VII.[17] This was the first U.S. federal district court to grant transsexuals protective rights. The ruling was short lived, however, because the U.S. Court of Appeals for the Seventh Circuit quickly overturned the district court decision.[18] Significantly, what both the district court and circuit court rulings did was set in motion an avalanche of court action regarding the rights of transsexuals. While the breadth of the circuit court's ruling continues to erode, Ulane remains today the touchstone in American transsexual jurisprudence.

Kenneth Ulane became a licensed pilot in 1964, serving in the U.S. Army until 1968. His service included a tour in Vietnam for which he received the Air Medal with eight clusters. Upon his discharge in 1968, Ulane was hired as a pilot for Eastern Airlines. By all accounts, Ulane had a successful career at

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Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex, 7 William and Mary Journal of Women and the Law 1, 159 (Fall 2000).

[14] Rentos v. OCE-Office Systems, 1996 U.S. Dist. WL 737215, at note 3 (S.D.N.Y. 1996).

[15] Notably, an amendment to the Rehabilitation Act excludes transsexualism from the definition of the phrase "individual with a disability." Pub. L. 102-569, Sec. 102, 106 Stat. 4349 (1992)(codified at 29 U.S.C. sec.706(8)(F)(I).

[16] See, e.g. Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir. 2001).

[17] Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1983).

[18] Ulane v. Eastern Airlines, 742 F. 2d 1081 (7th Cir. 1984).

Eastern, ultimately becoming a First Officer and flight instructor logging over 8,000 flight hours. In 1979 Ulane was diagnosed a transsexual and shortly thereafter began taking female hormones. Ulane underwent sexual reassignment surgery in 1980. After the surgery, the state of Illinois issued a revised birth certificate indicating Ulane was a female and the FAA certified her for flight as a female.[19] When Kenneth Ulane returned to work as Karen Ulane following surgery, "Eastern Airlines ended the successful career of one of its pilots".[20]

Following her termination in 1981, Ulane filed a complaint with the Equal Opportunity Commission. The Commission subsequently issued her a right to sue letter. Ulane alleged that she was discriminated against in violation of Title VII because she was a female and because she was a transsexual. Following a bench trial, the federal district judge agreed and found in favor of Ulane on both counts.[21] The court awarded her reinstatement as a flying officer with full seniority and back pay. Eastern Airlines appealed. The U.S. Court of Appeals for the Seventh Circuit first addressed the transsexual issue. The court concluded, "while we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals" and the district court's order must be reversed.[22] In reviewing the rubrics of Title VII, the court said, "a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."[23] The court found support in the legislative history of Title VII opining that discrimination based on sex should be given a narrow interpretation because Congress "never considered nor intended that this 1964 legislation (Title VII) apply to anything other than the traditional concept of sex."[24] The court, apparently searching for some solace for Ulane, clarified its role in the transsexual right debate by saying that to "hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating."[25] Finally, the court found comfort in its colleagues noting that only two circuit court cases it found at the time specifically addressed the issue of Title VII and transsexual discrimination. Both held that discrimination against transsexuals does not fall within the bounds of Title VII.[26]

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[19] Id. at 1082-1083.

[20] Jennifer L. Nevins, Getting Dirty: A Litigating Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism, 24 N.Y.U. Rev. L. & Soc. Change 383, 392 (1998).

[21] Ulane v. Eastern Airlines, 581 F. Supp. 821.

[22] Ulane v. Eastern Airlines, 742 F. 2d 1081, 1084.

[23] Id. at 1085.

[24] Id. (emphasis added).

[25] Id. at 1086.

When the circuit court addressed Ulane's female discrimination count, she did not fare any better. The court concluded that the district court judge failed to make factual findings necessary to support the conclusion that Eastern Airlines discriminated against Ulane because she was female. In the circuit court's view of the record, Eastern Airlines only knew Ulane as a male pilot and never considered her a female pilot regardless of her surgery. Noting that even if one believes that surgery can easily create a woman from a man, the fundamental examination is how Eastern viewed Ulane and the court concluded that Eastern considered Ulane as a man. Therefore, there is no available action for discrimination on the basis that Ulane is a female.[27]

The Ulane decision has made discrimination complaints by transsexuals under federal law very difficult. Like gays and lesbians, transsexuals seem to fall through the cracks of Title VII. As a result, transsexuals are generally caught between a rock and hard place. "Transsexual individuals are unable to assert claims for the discrimination leveled against them as transsexuals—a claim which the facts generally do support. At the same time, the only claim left to them, that discrimination was leveled against them on the basis of their post-operative sex, usually cannot find support in the facts which show discrimination based on their change in sex."[28] Notably, court decisions in the wake of Ulane tend to follow an analogous reasoning.[29]

In Dobre v. Nat'l R.R. Passenger Corp. (AMTRAK), 850 F. Supp. 284 (E.D. Pa. 1993), for example, the court reviewed numerous cases and opined that "it is well established that the term 'sex' is to be construed narrowly, according to its plain meaning."[30] The court then went on to take a closer look at the reasoning in both Ulane and Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir.1977). It concluded that "if AMTRAK considered Dobre to be female and discriminated against her on that basis (i.e. treated her less favorably than male employees), then Dobre would be able to maintain a Title VII action as a female."[31] Likewise, the Rentos Court, in distinguishing between federal, state, and local statutes, recites the Ulane mantra that Title VII's prohibition against sex discrimination can not be stretched to cover the claim of a transsexual.[32] Even the Seventh Circuit reaffirmed its reasoning 12 years latter in a case involving same sex harassment. "In Ulane, we acknowledged that although discrimination based on transsexualism is not actionable under Title VII, an individual who is a transsexual may nonetheless bring suit when discriminated against on the basis of his or her sex."[33]

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[26] See, Sommers v. Budget Marketing, Inc. 667 F. 2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir.1977).

[27] Id. at 1087.

[28] Nevins, supra, at 393.

[29] See, e.g. Rentos v. OCE-Office Systems, 1996 U.S. Dist. WL 737215 (S.D.N.Y. 1996); Dobre v. Nat'l R.R. Passenger Corp. (AMTRAK), 850 F. Supp. 284 (E.D. Pa. 1993).

[30] Dobre, at 286.

[31] Id. at 287 (emphasis original).

In a 1997 decision the U.S. District Court for the Southern District of New York applied the reasoning of Title VII to Title IX in a harassment case.[34] In that case a college professor allegedly harassed a student he believed was female. In fact, the university admitted that the professor's indefensible conduct caused the student to suffer distress and forced her out of the doctoral program. Unbeknownst to the professor and everyone else at the university, Miles was not a biological female. The court reviewed the matter on a summary judgment motion by the University. The University argued that the discrimination was because Miles was a transsexual and such discrimination is allowed under Ulane and its progeny. The court denied, however, the University's request precisely because of the reasons enunciated by the Seventh Circuit and others—the discrimination in this case was likely on the basis of sex not transsexualism. "There can be no doubt that Professor Eisen's conduct with respect to Jennifer Miles, assuming it can be proven, related to sex and sex alone. Title IX was enacted precisely to deter this type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved."[35]

Fundamentally, the cases involving transsexual individuals whether under Title VII or Title IX are intriguing because they force the courts into a discussion, and often a debate, between identity and equality. The transsexual is seeking both identity and equality while the courts want to address equality alone. To address equality, however, the court is forced into examining identity. "In setting forth the meaning of 'discrimination because of sex' the court must first identify what kind of wrong Title VII (and likewise Title IX) is to remedy: 'discrimination against women because of their status as females and discrimination against males because of their status as males'."[36]

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[32] Rentos, at note 4.

[33] Doe v. City of Belleville, Illinois, 119 F. 3d 563, 593 (7th Cir. 1997).

[34] Miles v. New York University, 979 F. Supp. 248 (S.D.N.Y. 1997).

[35] Miles at 250.

[36] Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 35 (1995).

Recent activity at the local and state level suggests that transsexuals may fare better by bringing action under state and local constitutions, statutes, regulations, and policies than under federal law.[37] Several cities now have laws prohibiting discrimination against transsexual individuals. Unlike Title VII and Title IX these laws specifically prohibit discrimination against an individual because he/she is a transsexual. The cities and counties include: Harrisburg, Pa; Minneapolis, Minn.; Seattle, Wash.; Boulder, Co.; St. Paul, Minn.; City and County of Santa Cruz, Ca.; City and County of San Francisco, Ca.; Iowa City, Iowa; Ypsilanti, Mich.; Pittsburgh, Pa.; Olympia, Wash.; Evanston, Ill.; Cambridge, Mass.; York, Pa.; West Hollywood, Ca.; Toledo, Ohio; New Orleans, La.; Benton County, Or.; Tucson, Ariz.; Louisville, Ky.; Lexington-Fayette, Ky.; Ann Arbor, Mich.; and Atlanta, Ga.[38] Additionally, Minnesota has a state law protecting transsexuals.[39]

In addition to state and local statutory and regulatory activity, two Supreme Court decisions taken together may some day open the door for relief for transsexuals under federal law. The first was Price Waterhouse v. Hopkins, 490 U.S.228 (1989) and the second was Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). In Price Waterhouse, the parties were at odds over whether Ann Hopkins was denied a partnership in the accounting firm based on an illegitimate criterion or a legitimate one. Hopkins pointed to the firm's reliance upon gender stereotypes as evidence that sex was the motivating factor in the firms' decision. In reviewing Hopkins work, the firm asserted that she was macho, overcompensated for being a woman, needed a course at charm school and was a lady using foul language. The Court concluded that Price Waterhouse engaged in sex stereotyping and ruled that employers can not use sex stereotyping in making employment decisions. Arguably, this expanded the reach of Title VII and Title IX to provide some protection for transsexuals to the extent that an employer's action is related to a transsexual's unwillingness to meet expected stereotypes. The Court concluded that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '(i)n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes'."[40] Finally, the Court stressed that it "need not leave our common sense at the doorstep when we interpret a statute."[41] This ruling is beginning to reshape the judicial landscape.

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[37] See, e.g., Doe v. Yunits, 2000 Mass. Super. LEXIS 491 (Oct. 11, 2000); Rentos.

[38] Shannon Minter, Representing Transsexual Clients: An Overview of Selected Legal Issues, http://academic.broooklyn.cuny.edu/polisci/pcurrah/genderlaw/translaw.htm (Sept. 17, 2000)

[39] MINN.STAT.ANN. §363.01, subd. 45 (West Supp. 2000).

[40] Price Waterhouse at 251, quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S 702. 707, n. 13 (1978).

[41] Id. at 241.

In Doe v. City of Belleville, Illinois, a case involving harassment of a boy because he did conform to a masculine stereotype, the court opined that Price Waterhouse "makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."[42] The court also concluded that Doe was singled out for abuse because his gender did not conform to his coworkers' view of appropriate masculine behavior. Clearly, "gender stereotyping establishes the link to the plaintiff's sex that Title VII requires."[43] Subsequently, the Ninth Circuit also expounded upon Price Waterhouse in Schwennk v. Harford, 204 F. 3d 1187 (9th Cir. 2000). The Schwennk court argued that after Price Waterhouse, Title VII "barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed 'to act like a woman'—that is, to conform to socially-constructed gender expectations.[44] The Schwennk court went on to conclude that Price Waterhouse expanded the interpretation of Title VII to include "discrimination because one fails to act in the way expected of a man or woman."[45]

In Oncale the Supreme Court arguably chips away at another long established view of Title VII that may ultimately enhance transsexual litigation. Joseph Oncale was employed as a roustabout on an eight-man crew for Sundowner Offshore Services on an oil platform in the Gulf of Mexico. On several occasions, Oncale was forcibly subjected to sex related, humiliating actions against him by his male co-workers. Oncale eventually quit—asking that his pink slip reflect that he voluntarily left due to sexual harassment and verbal abuse. Oncale filed a complaint in U.S. District Court alleging he was discriminated against because of his sex. The Supreme Court used Oncale to clarify the reach of Title VII regarding same sex harassment. "(W)e hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of ...sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[46] Significantly for those involved in the transsexual debate, the Court goes on to say that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[47] This "nothing...necessarily bars", "reasonably comparable evils", and the "common sense" (in Price Waterhouse) language move the legal system beyond the confined rubric of Congressional intent. It also arguably extends the reach of Title VII (and by analogy Title IX).

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[42] Doe v. City of Belleville, Illinois, 119 F. 3d 563, 580 (7th Cir. 1997)

[43] Id. at 581.

[44] Schwennk at 1201.

[45] Id. at 1202.

[46] Oncale at 79.

[47] Id.

The ultimate affect of Oncale on transsexuals' rights remains to be seen, but clearly inroads have been forged. Commentators are already lining up to expound upon Oncale's reach. "Oncale then stands for the principle that a cause of action may be recognized under Title VII even though Congress did not contemplate it when the statue was passed, as long as the cause of action is based on the 'comparable evil' and is consistent with the statutory language."[48] Clearly, the ruling nips at the heart of the meaning of "sex" in Title VII—that based on congressional intent "sex" should be construed very narrowly. Transsexual rights advocates long have argued that Title VII and its view of sex must transcend the narrow definition used in Ulane and its progeny. These advocates suggest Title VII and thus Title IX must be read to cover the "reasonably comparable evils" involved in transsexual discrimination. Meanwhile, transsexual litigants search for other avenues of protection.

In Doe v. Yunits, a Massachusetts court reviewed discrimination in light of the First Amendment. In that case, school officials in Brockton, Massachusetts tried to impose a personal dress code on a transgender student. Doe challenged the situation as violative of various rights, most prominently, her right of freedom of expression under the First Amendment and the Massachusetts Constitution Declaration of Rights, Article XVI.[49] While the defendants argued that the student's dress was disruptive to the school setting, the court determined that Doe could prove her[50] attire was not distracting, that she was barred from school on account of the expression of her identity and that the harm to Doe by the actions of the defendants outweighed the harm to the defendants in barring their order for Doe to dress like a boy.[51] The defendants argued that a female student would be disciplined for wearing distracting items of men's clothing such as a fake beard, making their dress code gender-neutral. The court responded that their argument was improperly framed since Doe identifies with the female gender. The court posed the correct question as being whether a female student would be disciplined for wearing items of clothes that Doe chose to wear.[52] The court went on to say that " defendants' reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestism are not controlling in this case because plaintiff is being discriminated against because of her gender."[53] The court also referenced federal cases that have recognized the impropriety of discriminating against a person for failure to conform with the norms of their biological gender.[54] In closing, the court said that it "trusts that exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience in that 'Brave New World' out there."[55]

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[48] Varona and Monks, supra., at 92.

[49] Doe v. Yunits, at 1.

[50] The court used female pronouns to refer to the plaintiff, a practice consistent with the plaintiff's gender identity and common among mental health and other professionals who work with transgender clients. Id at 4.

[51] Id. at 8, 10.

[52] Id. at 8.

While the federal courts have been slow to protect the rights of transgender individuals against discrimination based on sex, they have supported the rights of gay and lesbian individuals. This support is in the form of discrimination based on violations of sexual harassment law and policies and in violation of their Fourteenth Amendment and First Amendment rights.[56] This action on behalf of gays and lesbians may ultimately provide a safe haven for transsexuals.

In Nabozny v. Podlesny,[57] for example, the Seventh Circuit found that school administrators violated Jamie Nabozny's Fourteenth Amendment right to equal protection and their own policy prohibiting discrimination against students on the basis of gender or sexual orientation when they failed to protect him from harassment and assault of other students. When Nabozny entered 7th grade in 1988, he realized he was gay and decided not to "closet" his sexuality.[58] As a result, considerable harassment from his fellow students ensued throughout his 7th, 8th and 9th grade years of school. Nabozny reported harassment and attacks by students to school counselors and administrators, who promised to take action to protect him but repeatedly took none.[59] Following an assault from students that resulted in internal bleeding, Nabozny's high school assistant principal laughed and told Nabozny that he deserved such treatment for being gay.[60] The court found that Nabozny was harassed and battered for years and that school administrators failed to enforce their anti-harassment policies despite repeated pleas for them to do so. In sharp contrast, when female students complained of harassing behavior, administrators responded quickly and with appropriate disciplines. The court determined that administrators treated male and female victims differently under their policy and therefore discriminated on the basis of gender.[61] The court concluded that, "based on the record as a whole, a reasonable fact-finder could find that the District and defendants violated Nabozny's Fourteenth Amendment right to equal protection by discriminating against him based on his gender or sexual orientation. Further, the law establishing the defendants' liability was sufficiently clear to inform the defendants at the time that their conduct was unconstitutional."[62]

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[53] Id. at 8-9 citing Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984).

[54] Id. at 8 citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[55] Id. at 11.

[56] See, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Doe v. Yunits.

[57] Nabozny.

[58] Id. at 5.

[59] Id. After Nabozny informed his junior high school principal that two students had carried out a mock rape as twenty others looked on laughed, the principal responded that "boys will be boys" and that if he was "going to be so openly gay," he should "expect" such behavior from his fellow students.

[60] Id. at 6

Continuing a supportive trend, legislators from Washington State to West Virginia are taking action this year on bills designed to prevent bullying in schools in an effort to stave off violence committed by students on other students.[63] For example, in the wake of the shootings at Columbine High School, the Colorado legislature passed a law this past spring mandating that every school district in the state have an anti-bullying policy in place.[64] The West Virginia legislature followed suit passing a similar law this spring, and bills are pending in the states of Illinois, New York and Washington. These legislative efforts will provide gay and transsexual students with an alternative avenue of recourse when their peers prey upon them.

When California students and staff return to school this Fall, school administrators will be enforcing the provisions of Assembly Bill 537, a law passed by the state legislature last year. The measure expanded the state's anti-discrimination protections to include a guarantee that all students and staff members in public schools have a right to a safe learning environment regardless of sexual orientation or gender identity.[65] The law prohibits discrimination and harassment against students and staff members based on their actual or perceived sexual orientation or gender identify.

Bullying legislation is not, however, being universally accepted. The concept has been most controversial in Washington State where a Christian Coalition group opposed the bully-prevention bill, contending that it was a cover for gay-rights efforts that could eventually force schools to teach about homosexuality in a positive light.[66] The Coalition also contended that anti-bullying policies in schools could violate the free-speech rights of students who expressed opposition to homosexuality.[67] Their argument was supported by the decision of the 3rd Circuit in Saxe v. State College Area School District (SCASD).[68] The court found that an anti-harassment policy enacted by the defendant school district prohibited a substantial amount of speech that would not have constituted actionable harassment under federal or state law. They ruled that the policy was unconstitutionally overbroad because it prohibited a substantial amount of non-vulgar, non-sponsored student speech and that the policy's restrictions were not necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.[69]

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[61] Id. at 8.

[62] Id. at 14.

[63] Mary Ann Zehr, Legislatures Take On Bullies With New Laws, Education Week on the Web, May 16, 2001: 1.

[64] Id.

[65] Jessica L. Sandham, Calif. Panel Urges Safer Climate For Gay Students, Staff, Education Week on the Web, April 18, 2001, 1.

[66] Id.

The Price Waterhouse, Doe v. City of Belleville, Illinois, Schwennk, Nabozny, Doe v. Yunits, and Oncale decisions taken together provide a new path for the transsexual federal litigant. While the fundamental course is still to argue discrimination based on sex, other approaches are worth exploring. The litigant may want to examine, for example, whether dress code policies are the result of inappropriate sexual stereotyping or whether the true reach of Title VII and Title IX is to prohibit all forms of job discrimination. For the employer these decisions cloud the horizon. What are the rules regarding transsexual rights? A conservative approach would be to argue that both Price Waterhouse and Oncale are fact specific and at their worst do not apply to the issues facing transsexuals. Certainly, Federal Circuit Courts of Appeals such as the Fourth Circuit are unlikely, given its current makeup, to provide any inroads to transsexuals based on these decisions. On the other hand, the Ninth Circuit seems intent on expanding the rights of those not traditionally covered by Title VII.

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[67] Id. at 3.

[68] Saxe v. SCASD, 240 F.3d 200 (3rd Cir. 2001).

[69] Id.

THE ELEVENTH AMENDMENT: NEW INTERPRETATIONS AND APPLICATIONS TO SCHOOLS AND UNIVERSITIES

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THE ELEVENTH AMENDMENT: NEW INTERPRETATIONS AND APPLICATIONS TO SCHOOLS AND UNIVERSITIES

PART ONE

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HISTORY OF THE ELEVENTH AMENDMENT

I. Introduction

U.S.Const. art. III, sec. 1; Id. art. III, sec. 2, cl. 1; Id. amend. XI

II. Historical Background

A. Founding and Evolving Concepts of Sovereignty
U.S. Const. art. I, sec. 9, cl. 8
Id. amends. XIII, XIV, and XV
Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

B. Chisholm Drafts an Amendment

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793).

C. Reconstruction and the Eleventh Amendment

Swasey v. North Carolina Railroad, 90 U.S. (23 Wall.) 405, 23 L.Ed. 136 (1875).
Forbes v. Memphis, El Paso and Pacific Railroad, 9 F.Cas 408 (C.C.W.D. Tex 1872).
Louisiana v. Jumel, 107 U.S. 711, 2 S.Ct. 128, 27 L.Ed. 448 (1883).
New Hampshire v. Louisiana, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883).
McGahey v. Virginia, 135 U.S. 662, 10 S.Ct. 972, 34 L.Ed. 304 (1890).

D. Hans Broadens a Constitutional Concept

Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).
North Carolina v. Temple, 134 U.S. 22, 10 S.Ct. 509, 33 L.Ed. 849 (1890).
Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).
United States v. Texas, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285 (1892).
South Dakota v. North Carolina, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904).
Kansas v. United States, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510 (1907).

E. Continuing Questions of Abrogation

Clark v. Barnard, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883).
Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).
Fitzpatrick v. Blitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).
Atascadero v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).
Toll v. Moreno, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982).
Pennsylvania v. Union Gas Company, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).
Parden v. Terminal Railroad, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).
Blatchford v. Noatak, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991).

PART TWO

Al Miles, Professor, University of Alabama

U. S. SUPREME COURT CASES SINCE 1990

McKesson Corp. v. Division of Alcohol, Beverages, and Tobacco, Department of Business Regulation of Florida, 110 S.Ct. 2238, 496 U.S. 18 (1990).

Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868 (1990).

Blatchford v. Native Village of Noatak and Circle Village, 111 S.Ct. 2578 (1991).

Missouri v. Jenkins, 110 S.Ct. 1651, 495 U.S. 33, 109 L.Ed.2d 31 (1990), on subsequent appeal, Jenkins by Agyei v. Missouri, 949 F.2d 1052 (8th Cir. 1990).

Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc., 113 S.Ct. 684 (1993), on remand 991 F.2d 935.

Reich v. Collins, 115 S.Ct. 547 (1994). (11th Amendment bars tax refund claims in federal court.)

Hess v. Port Authority Trans-Hudson Corp., 115 S.Ct. 394 (1994).

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996). (Congress lacks authority under Commerce Clause to abrogate state's sovereign immunity under 11th Amendment, overriding Pennsylvania v. Union Gas, 109 S.Ct. 2273 (1989).

Regents of University of California v. Doe, 117 S.Ct. 900 (1997), opinion withdrawn John Doe v. Lawrence Livermore National Laboratory, John Nuckolls, Director, Regents of University of California, 109 F.3d 1502 (9th Cir. 1997). (Breach of contract claim by math physicist against laboratory indemnified by Department of Education).

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997), on remand 118 F.3d 1399.

Boerne v. Flores, 117 S.Ct. 2157 (1997). (Although not Eleventh Amendment case, shows developing theory of enforcement power under Fourteenth Amendment.)

California v. Deep Sea Research, 118 S.Ct. 1464 (1998).

Calderon v. Ashmus, 118 S.Ct. 1694 (1998). (Eleventh Amendment not co-extensive with limitations on judicial power under Article III.)

Wisconsin Dept. of Corrections v. Schact, 118 S.Ct. 2047 (1998). (Presence in otherwise removable case of an 11th Amendment barred claim does not destroy removal jurisdiction that would otherwise exist; court may hear non-barred claims, abrogating Francis J. v. Wright, 193 F.3d 337 and McKay v. Boyd Constr. Co., 769 F.2d 1084.)

South Central Bell Telephone Co. v. Alabama, 119 S.Ct. 1180 (1999). (Eleventh Amendment was no bar to Supreme Court from reviewing issues of federal law in a foreign corporation's challenge to the Alabama franchise tax.

Alden v. Maine, 119 S.Ct. 2240 (U.S. 1999). (FLSA provision authorizing private actions against states in state courts is unconstitutional abrogation of sovereign immunity, abrogating Jacoby v. Arkansas Dept. of Educ., 962 S.W.2d 778 (Ark. 1998).)f

College Savings Bank v. Florida Prepaid Postsecondary Expense Bd., 119 S.Ct. 2219 (1999). (Business interests in freedom from competitor's false advertising is not a property right protected by Fourteenth Amendment; Congress had no power under Fourteenth Amendment to abrogate the Eleventh Amendment in claims of patent infringement in Patent and Plant Variety Protection Remedy Clarification Act, nor did it have power under the Patent or Commerce Clauses.)

Kimel v. Board of Regents, 120 S.Ct. 631 (2000). (ADEA did not validly abrogate 11th Amendment under Congress' Art. I powers.)

Bd. of Trustees of University of Alabama v. Garrett, 121 S.Ct. 955 (U.S. 2001). (abrogation of Eleventh Amendment immunity by ADA invalid; failure to identify pattern of irrational state discrimination in employment against the disabled; concerns related to proportionality and congruency).

Kansas v. Colorado, 121 S.Ct. 2023 (2001). (State may recover monetary damages from another State in original action without running afoul of the 11th Amendment.)

Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Services, 121 S.Ct. 1835 (2001).

PART THREE

Dave Dagley, Associate Professor, University of Alabama

ALTER EGO STATUS OF EDUCATIONAL ENTITIES

I. UNIVERSITIES

Alter Ego/Arm of the State

Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994). Univ. Okla. Health Services Center.

Dover Elevator Co. v. Arkansas State University, 64 F.3d 442 (8th Cir. 1995).

Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992). (Regents Univ. Cal.)

Partington v. Gedan, 961 F.2d 852 (9th Cir. 1992), as amended, cert. denied 113 S.Ct. 600. (Law School)

Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993), cert. denied 114 S.Ct. 1071. (Ky.)

Laxey v. Louisiana Bd. Of Trustees, 22 F.3d 621 (5th Cir. 1994).

Lujan v. Regents of University of California, 69 F.3d 1511 (10th Cir. 1995).

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Wallace v. Texas Tech University, 80 F.3d 1042 (5th Cir. 1996).

Watson v. University of Utah Medical Center, 75 F.3d 569 (10th Cir. 1996).

Kelley v. Troy State University, 923 F.Supp. 1494 (M.D.Ala. 1996).

Thomas v. Devries, 834 F.Supp. 398, affirmed 36 F.3d 95 (M.D.Ga. 1993). (Georgia College and the Board of Regents of University System of Georgia.)

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In re Recombinant DNA Technology Patent and Contract Litigation, 874 F.Supp. 904 (S.D.Ind. 1994). (Permissive rather than compulsory counter claim, thus retained immunity.)

Van Pilsum v. Iowa State University of Science and Technology, 863 F.Supp. 935 (S.D.Iowa 1994).

Ballou v. University of Kansas Medical Center, 871 F.Supp.2d 1384 (D.Kan. 1994).

Johnson v. Wefald, 779 F.Supp.154 (D.Kan. 1991). (Cannot be sued for prospective injunctive relief.)

Ndefru v. Kansas State University, 814 F.Supp. 54 (D.Kan. 1993).

Roberson v. Bowie State University, 899 F.Supp. 235 (D.Md. 1995).

Halikas v. University of Minnesota, 856 F.Supp. 1331 (D.Minn. 1994).

Burnham v. Ianni, 899 F.Supp. 395, reversed 98 F.3d 1007 (8th Cir. 1996), rehearing granted, opinion vacated, on rehearing 119 F.3d 668, affirmed 119 F.3d 668 (8th Cir. 1997).

Unix Systems Laboratories, Inc. v. Berkeley Software Design, Inc., 832 F.Supp. 790 (D.N.J. 1993) (N.J. state university on claim alleging breach of licensing agreement and misappropriation of trade secrets.)

Moche v. City University of new York, 781 F.Supp. 160 (E.D.N.Y. 1992), affirmed 999 F.Supp. 538.

Minetos v. City University of New York, 875 F.Supp. 1046 (S.D.N.Y. 1995).

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Bium v. Schlegel, 830 F.Supp. 712 (W.D.N.Y. 1993), affirmed 18 F.3d 1005. (Law School).

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Davis v. Kent State University, 928 F.Supp. 729 (N.D.Ohio 1996).

Mackey v. Cleveland State University, 837 F.Supp. 1396 (N.D.Ohio 1993).

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Nogueras v. University of Puerto Rico, 890 F.Supp. 60 (D.Puerto Rico 1995).

Silva v. Universidad de Puerto Rico, 834 F.Supp. 553 (D.Puerto Rico 1993).

Heifner v. University of Tennessee, 914 F.Supp. 1513 (E.D. Tenn. 1995).

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Idoux v. Lamar University System, 817 F.Supp. 637 (E.D.Tex. 1993). (Legal status; control; $ judgment?).

Collin v. Rector and Bd. of Visitors of University of Virginia, 873 F.Supp. 1008 (W.D.Va. 1995).

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Stefanovic v. University of Tennessee, 935 F.Supp. 944 (E.D.Tenn. 1996).

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Williams v. University of Illinois, 945 F.Supp. 163 (N.D.Ill. 1996) (UI police department; s. 1983).
Teichgraeber v. Memorial Union Corp. of the Emporia State University, 946 F.Supp. 900 (D.Kan. 1996)
Baldwin v. University of Texas Medical Branch at Galveston, 945 F.Supp. 1022 (S.D.Tex. 1996).
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Carboni v. Meldrum, 949 F.Supp. 427 (W.D.Va. 1996), affirmed 103 F.3d 116. (Veterinary college)
Chaco v. Texas A^M University, 960 F.Supp. 1180 (S.D.Tex. 1997).
Palotai v. University of Maryland, 959 F.Supp. 714 (D.Md. 1997).
Chin v. City University of New York School of Law at Queens College, 963 F.Supp. 218 (E.D.N.Y. 1997) (s. 1981).
Gaines v. Texas Tech University, 965 F.Supp. 886 (N.D.Tex. 1997).
Richardson v. Southern University, 118 F.3d 450 (5th Cir. 1997).
Vazquez Morales v. Estado Libre Asociado de Puerto Rico, 967 F.Supp. 42 (D.Puerto Rico 1997).
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Roach v. University of Utah, 968 F.Supp. 1446 (D.Utah 1997).
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Burell v. CUNY, 995 F.Supp. 398 (S.D.N.Y. 1998)
Graham v. State, 956 P.2d 556 (Colo. 1998), overruling Uberoi v. University of Colorado, 713 P.2d 894
Emberg v. University of Maryland University College Asian Div., 3 F.Supp.2d 1127 (D.Hawai'i 1998).
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Driesse v. Florida Bd. of Regents, 26 F.Supp.2d 1328 (M.D.Fla. 1998).
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Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000). (ADEA).
Power v. Summers, 226 F.3d 815 (7th Cir. 2000) (limited geographic range of regional state university).
Das v. Ohio State University, 115 F.Supp.2d 885 (S.D.Ohio 2000).

Not Alter Ego/Not Arm of the State

Doe v. Lawrence Livermore Nat. Laboratory, 65 F.3d 771, cert. granted, Regents of University of California v. Doe, 116 S.Ct. 2522, 135 L.Ed.2d 1047, reversed, 117 S.Ct. 900, opinion withdrawn, 109 F.3d 1502. (for contract and s. 1983 purposes.)
Sherman v. Curators of University of Missouri, 16 F.3d 860 (8th Cir. 1994), rehearing denied, on remand 871 F.Supp. 344. (University may not structure financial records to make judgment come from state funds.)
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Honadle v. University of Vermont, 115 F.Supp.2d 468 (D.Vt. 2000). *

Immunity Abrogated

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Fuller v. Rayburn, 161 F.3d 516 (8th Cir. 1998) (Missouri)
Vega v. SUNY Bd. of Trustees, 67 F.Supp.2d 324 (S.D.N.Y. 1999). (Title IX).
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Cobb v. The Rector and Visitors of Universityof Virginia, 69 F.Supp.2d 815 (W.D.Va. 1999).
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Prospective Injunctive Relief in Official Capacity

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Harris v. Mississippi Valley State University, 899 F.Supp. 1561 (S.D.Miss. 1995).
Beasely v. Alabama State University, 3 F.Supp.2d 1304 (M.D.Ala. 1998).
U.S. ex rel. Long v. SCS Business ^ Technical Institute, 999 F.Supp. 78 (D.D.C. 1998).
Smith v. University of Washington Law School, 2 F.Supp.2d 1324 (W.D.Wash. 1998).
DeBauch v. Virginia Commonwealth University, 7 F.Supp.2d 718 (E.D.Va. 1998).
Buchwald v. Univ. of New Mexico School of Medicine, 159 F.3d 487 (10th Cir. 1998). (admission to med school.)
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Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999).
DeBauche v. Trani, 191 F.3d 499 (4th Cir. 1999). (Ex parte Young inapplicable when not ongoing violation).
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Plaintiff Waiver of Immunity

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Alter Egos/Arms of the State

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CHARTER SCHOOLS AND STATE CONSTITUTIONS

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INTRODUCTION

Thirty-seven states, [1] the District of Columbia,[2] and Puerto Rico[3] have adopted legislation creating charter schools. Charter schools are public schools that receive waivers from many of the regulations that apply to traditional public schools. In return, charter schools are accountable to their sponsors – usually state or local boards of education – to achieve academic results. The "charter" is a performance contract describing the school's mission, program, goals, student population, and methods of evaluation. At the end of the term, the entity awarding the contract may renew the school's charter.[4]

Charter schools differ from traditional public schools in several ways. Charter schools are granted autonomy from many administrative rules. Charter schools have more freedom to design their educational curricula. Many statutes authorize groups other than state and local boards of education to serve as charter school sponsors. School districts worry that these differences might entice many students to leave conventional public schools, thus taking away educational funding.

This paper examines state constitutional litigation relating to charter schools. First, an examination of the constitutional challenges that arise from the differences between charter schools and conventional public schools is provided. Specifically, three types of questions previously presented to courts are analyzed: (1) whether charter schools are too private to be

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considered public schools; (2) whether charter schools are part of a system of public schools; (3) whether state legislatures have unconstitutionally divested authority to operate charter schools from state and local boards of education.

Second, an analysis of the constitutional issues surrounding charter school funding systems is provided. Two questions are addressed: (1) whether charter school financing systems might prevent school districts from providing an adequate level of funding to other public schools; (2) whether educational funding systems are vulnerable to equity challenges from charter schools.

CHALLENGES BASED ON THE DIFFERENCES BETWEEN CHARTER SCHOOLS AND TRADITIONAL PUBLIC SCHOOLS

A. Are Charter Schools Too “Private” to Receive State Funding?

Several categories of constitutional challenges originate from the differences between charter schools and conventional public schools. The first category alleges that charter schools are unconstitutional because they are too “private” to receive funding from the state. The constitutions of at least 18 charter school states contain provisions that prohibit funding to private schools. Several constitutions prohibit the funding to private schools, or permit the funding of only public schools. Other constitutions permit the state to fund only schools that are under the exclusive control of the state. Table 1 identifies and categorizes these charter school states.[5]

Table 1: Charter School States with Constitutions That Might Prohibit Funding to Private Schools

States with Constitutions that Forbid Funding of Private Schools	Alaska, Hawaii, Michigan, South Carolina, Mexico
States with Constitutions that Permit Funding of Only Public Schools	Connecticut, Delaware, Florida, Missouri, New Jersey, North Carolina, Oklahoma, Rhode Island, Texas, Wyoming
States with Constitutions that Permit Funding Only to Schools that Are under the Exclusive Control of the State	California, Massachusetts, New Mexico

The first decision to address whether charter schools were sufficiently public to receive state funding was *Council of Organizations about Parochiaid v. Governor*.[6] A Michigan trial court ruled that the state's charter schools were not sufficiently public because they were neither under the immediate and exclusive control of the state, nor governed by publicly elected bodies. The state's court of appeals upheld the ruling of the trial court.

However, the Michigan Supreme Court reversed the lower courts by finding by that the state's charter schools were public schools under the state constitution. The high court ruled that the state constitution did not require public schools to be under the exclusive control of the state. However, the court went on to find that Michigan's charter schools would have satisfied this requirement. The state exercised exclusive control through the authorizing bodies' power to approve applications and revoke charters. The state also exercised control through its funding of charter schools. Moreover, the legislature demonstrated its intent to exercise control over charter schools. No specific provisions of the charter school statute limited the power of the state. Furthermore, when the legislature revised the school code, it specifically included charter schools within its provisions.

The Michigan Supreme Court rejected the claim that the state's charter schools were not sufficiently public because they were run by a private board of directors, and the authorizing body had no means to select members of the board. The legislature exercised control over the board by prescribing the method for choosing school officers. Additionally, the public maintained control of the private board of directors through the authorizing bodies, whose boards were publicly elected or appointed by public bodies. Furthermore, the Michigan Supreme Court denied the claim that the state's public schools had to be under the control of the voters in a school district. Michigan's constitution mandated that the legislature must control the public schools. The entire state electorate exercised control of the public school system through the legislature.

Since *Council of Organizations*, two other state appellate courts have used legal reasoning similar to that of the Michigan Supreme Court to rule that their charter schools were sufficiently under the control of the state to be considered public schools. In *Wilson v. State Board of Education*, the California Court of Appeal wondered "what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level."[7] Chartering authorities exercised control through their application approval and revocation powers. Chartering authorities were also authorized to inspect any part of the charter school at any time. The state board of education exercised control through its authority to promulgate implementing regulations. Funding of charter schools rested in the hands of the state superintendent of schools. Furthermore, the court held that the state had not abandoned control by authorizing charter schools to make decisions regarding curriculum and other educational functions. The legislature had properly exercised its discretion to improve public schools by encouraging experimentation and competition.

In *In the Matter of the Grant of the Charter School Application of Englewood on the Palisades Charter School*, the Superior Court, Appellate Division of New Jersey held that charter schools did not violate a constitutional provision requiring public money to be used only for public purposes.[8] The legislature made it clear that charter schools served a public purpose. The charter school statute stipulated that charter schools were part of the public school system and were in the best interests of its students. The statute declared that charter schools were public schools and their governing boards were public agents. Additionally, the court observed that the state commissioner of education could revoke a charter at any time, and that the district board determined the amount of a charter school's budget.[9]

The *Council of Organizations*, *Wilson*, and *Palisades Charter School* cases suggest that charter schools in other states might withstand challenges that they are not public schools. In each of these cases, the courts deferred to the state legislatures' finding that charter schools were public. These courts also held that the state exercised sufficient control through the approval, budgeting, and revocation processes. It is important to recognize, however, that other state courts may interpret their constitutions in a different manner. For instance, the Washington Supreme Court has concluded that public schools must be under the control of the school district's voters.[10] In *Council of Organizations*, the Michigan Supreme Court acknowledged that the Michigan and Washington constitutions differ with regard to voter control over public schools.[11]

B. Are Charter Schools a Constitutional Part of a Public School System?

The differences between charter schools and other public schools might make charter schools vulnerable to claims that they fall outside of the public school system. Several state constitutions contain terms that might limit the variability of the public schools. For instance, several constitutions require the state to provide for a system of public, or common, schools. Other constitutions require the provision of a "uniform," "general" or "uniform and general"

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system of public schools. Table 2 identifies charter school states with these constitutional requirements.

Table 2: Charter School States with Constitutions That Might Limit the Variability of Charter Schools

States with Constitutions Requiring the Provision of a System of Public Schools	Alaska, California, Hawaii, Illinois, Michigan, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia, Wyoming
States with Constitutions Requiring the Provision of a General System of Public Schools	Arkansas, Delaware
States with Constitutions Requiring the Provision of Public Schools by General Law	Alaska, California, Mississippi
States with Constitutions Requiring the Provision of a Uniform System of Public Schools	Colorado, Florida, Nevada, New Mexico, Wyoming
States with Constitutions Requiring the Provision of Uniform Schools	Wisconsin
States with Constitutions Requiring the Provision of a General and Uniform System of Public Schools	Arizona, Idaho, Minnesota, North Carolina, Oregon

These terms imply that all public schools should have substantially the same educational programming and administrative structure. The term "system" also suggests that all public schools must work in an efficient manner. Charter schools might be unconstitutional because their educational and administrative structure can differ substantially from those of other public schools. Charter schools might also fail to comply with constitutional understandings of efficient systems. Because many charter schools provide unique instruction, their students might have a difficult time transferring to other public schools.[12]

In *Wilson*, the California Court of Appeal ruled that charter schools did not violate a constitutional provision requiring the state to provide for a "system of common schools." In California, the term "system" had come to mean a "unity of purpose, as well as an entirety of operation; and the direction to the legislature to provide 'a' system of common schools means *one* system, which shall be applicable to all the common schools within the state."[13] This meant that the educational system "must be uniform in terms of the prescribed course of study and educational progression from grade to grade."[14]

The court then concluded that charter schools were part of a single system of common schools. It deferred to the legislature's finding that charter schools were (1) part of the school system; (2) under its authority; and (3) entitled to full funding. Also, the statute placed charter schools firmly within the system uniformity requirement. Charter school teachers had to satisfy the same minimum requirements as other public school teachers. The educational programs of charter schools had to meet the same requirements as other public schools. Student progress was measured by the same assessments applicable to all public school students. Finally, charter schools received funding comparable to public schools, and the statute protected against funds flowing outside of the system.

C. Do Charter Schools Unconstitutionally Divest Authority from State and Local Boards of Education?

Moreover, charter school statutes might be vulnerable to claims that they unconstitutionally divest authority away from entities that are authorized to supervise public school systems, such as state and local boards of education. Charter school statutes might violate these constitutional provisions by, among other things, placing discretion over spending directly on charter schools, or by granting chartering authority to independent public agencies, such as public universities.[15]

In *Council of Organizations*, the Michigan Supreme Court ruled that the state's charter school statute did not unconstitutionally divest the state board of education of its duty to provide "leadership and general supervision" over public education.[16] Because the statute declared that charter schools were public schools, the court found that the legislature had subjected charter schools to the same degree of board of education supervision as other public schools.

In *Utah School Boards Association v. Utah State Board of Education*,[17] the Utah Supreme Court also ruled that the state's charter school statute did not unconstitutionally divest "general control and supervision of the public educational system" from the state board of education.[18] The court rejected the claim that the state constitution did not authorize the state board to manage charter schools in a manner different from other parts of the public school system. This interpretation was unreasonable because it was beyond question that the state board of education could operate separate types of schools in a different manner. For instance, the state board's accreditation rules for junior high and middle schools were different from those for high schools and special schools.

In *Board of Education v. School District No. 1 v. Booth*,[19] the Colorado Supreme Court held that the state charter school statute's second-appeal provision did not unconstitutionally divest "control of instruction in the public schools" from local boards of education.[20] Individuals or groups that wished to open a charter school applied to the local board in the district where the school would be located. Any interested party could appeal a local board's decision to deny a charter to the state board of education. On the first appeal, the state board could either affirm the local board's decision or remand with specific recommendations for reconsideration. If, on remand, the local board again denied the application, a charter school applicant could make a second appeal to the state board. On the second appeal, the state board could remand a decision to the local board with instructions to approve charter application if doing so would be in the best interests of pupils, school district, or community. The Colorado Supreme Court upheld the second-appeal provision because it did not constitute a final contract between the local school board and the charter school applicants. Rather the second-appeal provision merely required the local school board to make a good faith effort to resolve any issues that might prevent the opening of a charter school.

EDUCATIONAL FUNDING CHALLENGES

Constitutional litigation surrounding charter schools may soon revolve around educational funding issues. The primary goal of school finance litigation is to counteract the discriminatory effects of school funding systems, which rely primarily on property taxes, on poor districts. Several courts have invalidated educational funding systems on the ground that they violate the education clauses of state constitutions, which define the states' duty to educate their citizens. Courts have used two concepts to invalidate school finance formulas: equity and adequacy. Equity requires the state to provide all school districts with substantially equivalent resources. Adequacy requires the state to provide all districts with a constitutionally mandated minimum, or adequate, level of education. Courts have defined adequacy in terms of both educational resources and student outcomes.[21]

A. Constitutional Challenges from Local School Boards

Local boards of education may argue that charter schools prevent school districts from providing an adequate education to other public schools. Generally speaking, the per-pupil allotment for education follows the child. Local boards fear that if enough students leave the school district to attend charter schools, school districts might be unable to cover fixed costs, such as maintaining buildings and compensating staff. The New Jersey School Boards Association summarized the problem in the following manner:

> As much as 30 percent of district operations are in non-personnel fixed and residual costs. By way of example, in a district with 3500 pupils and five buildings, the loss of 300 students to a charter school could cost the district as much as $3 million in State and local funds.
>
> Yet if they lost the $3 million in State and local funds, they would still have five buildings to run, debt service to be paid, maintenance to be performed, space to be heated and insured.[22]

According to a federally funded study of charter school finance systems, *Venturesome Capital: State Charter School Finance Systems*,[23] states have addressed this problem in a variety of ways. Charter schools in some states receive less than 100 percent of the operating revenue in the district sending a student to a charter school. In most states, capital funding does not accompany charter school students.

In the *Palisades Charter School* case, the Superior Court, Appellate Division of New Jersey dismissed a local board's constitutional claim that the state's charter school funding system failed prevented them from providing their schools with an adequate education. The state's charter school statute required the school district to pay the charter school for each student enrolled in the charter school a presumptive amount of 90% of the local levy budget per pupil for the specific grade level in the district.[24] The state's commissioner of education had the discretion to require the school district to pay an amount less than 90%, or an amount not to exceed 100% of the local levy budget per pupil for the specific grade level in the district of residence. The Franklin Township School District alleged that the charter school statute violated Article VIII, § 4 of the state constitution, which requires the state to provide a thorough and efficient education, because the statute, among other things, diverted funds away from the school district to pay for the Franklin Charter School. The court rejected this argument as speculative because the school had not opened yet. As the court explained, "Not until the school has operated for at least a year, or perhaps more, will it be possible to gauge whether its presence is subverting the district's ability to provide a constitutionally adequate education for its students."[25] On appeal, the New Jersey Supreme Court ruled that the charter school statute required the commissioner to consider the economic impact that approval of a charter school would have on a district of residence once the district made a preliminary showing that its ability to provide a thorough and efficient education would be jeopardized.

In *Board of Education of the Roosevelt Union Free School District v. Board of Trustees of the State University of New York,*[26] the Supreme Court, Appellate Division of New York also refused to consider the Roosevelt Union Free School District's challenge to the constitutionality of a charter school funding scheme. The school board opposed the opening of the Academy Charter School within its boundaries because the charter school could take $1.2 million to $1.7 million dollars from the district's coffers. The school board argued that the loss of such revenue would adversely affect its ability to provide a quality education by forcing the district to eliminate or reduce certain programs, services and staff.

Roosevelt claimed that the statutory scheme, which required the district to pay the charter school directly for each student, violated the state constitution by impermissibly taking away guaranteed funding from the school district. The court dismissed this claim because the district had no proprietary interest in a specific sum of money. Rather, Roosevelt's level of funding depended on its schools' daily attendance figures. As attendance varied, so did the specific amount that the district received. However, the court held that the school board could challenge the chartering entity's decision to approve the application of the Academy Charter School under Article 78 of the Civil Practice Law and Rules. The court observed that the school district's right to challenge the issuance of the charter could be inferred as part of its duty to "provide a system of a public education to all children within its district."[27] This inference was especially strong in this case because of the school board's claims that: (1) the granting of the charter jeopardized its ability to educate all students within the district's boundaries; and (2) the charter entity insufficiently considered the issue of financial impact on the district.

B. Constitutional Challenges from Charter Schools

Ironically, the steps taken by states to ensure that school districts receive an adequate education might make them vulnerable to equity challenges from charter school students and parents. *Venturesome Capital* observes that educational funding systems employ several strategies to ensure that charter schools receive substantially the same amount of funding as other public schools. For example, charter schools may receive "in-kind" services from school districts, such as oversight, transportation, and financial services, that may not be measured in charter school revenue calculations. Also, charter schools can organize their grade level configuration and enrollment to generate optimal funding.

Students and parents from charter schools that serve at-risk and low-income students might challenge educational funding systems on adequacy grounds. Schools that serve these populations might need extra funding to attain adequate educational outcomes. However, *Venturesome Capital* observes that the charter school financing systems of several states fail to provide extra funding for at-risk and low-income students. States might protect themselves from adequacy challenges by providing extra funding for charter schools that serve these students. Strategies include pupil-weighting systems that provide additional funding beyond base funding for each at-risk or low-income student, and categorical funding for specific programs, such as special education.

Finally, the method that states use to count their students for funding purposes might expose them to equity challenges from charter schools serving low-income and at-risk charter schools. Most states use average daily membership or the number of pupils enrolled in a charter school to count the number of students. According to *Venturesome Capital*, Texas and California use average daily attendance figures (ADA) to count the number of students. ADA funding might expose these states to equity challenges from charter schools that serve at-risk and low-income students because such students generally have higher rates of absenteeism than other students. As a result, charter schools that serve disadvantaged children might receive less funding than average schools. California and Texas offset the ADA equity problem to some extent by providing extra funding for at-risk students.

CONCLUSION

Charter schools might be susceptible to state constitutional litigation. The first type of constitutional challenge arises from the differences between charter schools and traditional public schools. Plaintiffs have asserted that: (1) charter schools are too private to be considered public schools; (2) charter schools are not part of a system of public schools; and (3) state legislatures have unconstitutionally divested authority from state and local boards of education. So far, courts have upheld the constitutionality of charter schools against these challenges. Courts have deferred to the legislature, and looked to the statutory text to conclude that charter schools are no so different as to be unconstitutional. However, other state courts might interpret their constitutional provisions in a different manner.

An emerging area of constitutional litigation concerns charter school funding. Charter schools might prevent school districts from providing an adequate level of funding to other public schools by enticing too many students to leave. States have addressed this fear by not allowing the entire per-pupil allotment from going to the charter schools. However, this approach might make charter schools vulnerable to equity challenges from charter school children and parents. This potential challenge is mitigated by the fact that charter schools receive several types of in-kind services from school districts. Finally, states might be vulnerable to constitutional challenges from plaintiffs representing low-income and at-risk charter schools if: (1) they fail to provide additional funding for these student populations; and (2) they use average daily attendance (ADA) figures for funding purposes.

ENDNOTES

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[1] (1) Alaska, ALASKA STAT. §§ 14.03.250–.290 (Michie, WESTLAW through 3rd Spec. Sess. of 21st Legis.); (2) Arizona, ARIZ. REV. STAT. §§ 15-181–15-189.03 (WESTLAW through 2000 2nd Reg. Sess., 5th Spec. Sess., and Nov. 7, 2000 Gen'l Election); (3) Arkansas, ARK. CODE ANN. §§ 6-23-101– 507 (Michie, WESTLAW through 1999 Reg. Sess.); (4) California, CAL. EDUC. CODE §§ 47600– 47664 (Deering, WESTLAW through 1999-2000 Reg.Sess., 1st Ex.Sess., and Nov. 7, 2000); (5) Colorado, COLO. REV. STAT. §§ 22-30.5-101 – 308 (WESTLAW through 2000 2nd Reg. Sess.); (6) Connecticut, CONN. GEN. STAT. §§ 10-66aa -- gg (LEXIS through Jan. 1, 2001); (7) Delaware, DEL. CODE ANN. tit.14, §§ 501 – 516 (WESTLAW through 2000); (8) Florida, FLA. STAT. chs. 228.056 – .0581 (WESTLAW through 2000 2nd Reg. Sess.); (9) Georgia, GA. CODE §§ 20-2-2060– 2071 (WESTLAW through 2001); (10) Hawaii, HAW. REV. STAT. §§ 302A-1181 – 1189 (WESTLAW through 1999-2000); (11) Idaho, IDAHO CODE §§ 33-5201 – 5212 (WESTLAW through 2000 Cum. Supp.); (12) Illinois, 105 ILL. COMP. STAT. §§ 5/27A-1— 13 (West, WESTLAW through 2000 Reg. Sess.); (13) Indiana, 2001 Ind. Sen. Enrolled Act 165; (14) Kansas, KAN. STAT. ANN. §§ 72-1903 -- 1910 (WESTLAW through 2000 Reg. Sess.); (15) Louisiana, LA. REV. STAT. §§ 17:3971 – 4001 (West, WESTLAW through 2000 Reg. and Extraord. Sess.); (16) Massachusetts, MASS. ANN. LAWS ch. 71 § 89 (WESTLAW through 2000 2nd Sess.); (17) Michigan, MICH. COMP. LAWS §§ 380.501 -- 518 (WESTLAW through through P.A. 2000, No. 506 of 2000 Reg. Sess.); (18) Minnesota, MINN. STAT. §§ 124D.10 -- .11 (WESTLAW through 2000 Reg. Sess.); (19) Mississippi, 2001 Miss. Laws Laws 531 (to be codified as MISS. REV. STAT. §§ 37-28-1 – 21); (20) Missouri, MO. REV. STAT. §§ 160.400 -- .420 (WESTLAW through 2000 2nd Reg. Sess.); (21) Nevada, NEV. REV. STAT. ANN. §§ 386.500 – .610 (Michie, WESTLAW through 1999 Reg. Sess.); (22) New Hampshire, N.H. REV. STAT. ANN. §§ 194-B:1 – 22 (WESTLAW through Chapter 328 of the 2000 Reg. Sess.); (23) New Jersey, N.J. STAT. §§ 18A:36A-1—18 (West, WESTLAW through through ch. 179 of 2000 Legis. Sess.); (24) New Mexico, N.M. STAT. ANN. §§ 22-8B-1 -- 8C-7 (Michie, WESTLAW through 2000); (25) New York, N.Y. C.L.S EDUC. §§ 2850—2857 (McKinney, WESTLAW through 2000 Legis. Sess.); (26) North Carolina, N.C. GEN. STAT. §§ 115C-238.29A – K (WESTLAW through 2000 Reg. Sess.); (27) Ohio, OHIO REV. CODE ANN. §§ 3314.01– .020 (Anderson, WESTLAW through Mar. 30, 2001); (28) Oklahoma, 70 OKLA. STAT. §§ 3-130 -- 152 (WESTLAW through ch. 9 of 2000 1st Ex.Sess.); (29) Oregon, OR. REV. STAT. §§ 338.005 -- .185 (WESTLAW through 1999); (30) Pennsylvania, 24 PA. STAT. §§ 17-1701-A -- 1732-A (WESTLAW through 2000 Reg. Sess.); (31) Rhode Island, R.I. GEN. LAWS §§ 16-77-2 -- 77-1.5 (WESTLAW through 2000 Reg. Sess.); (32) South Carolina, S.C. CODE ANN. §§ 59-40-10 – 190 (Law Co-op., WESTLAW through 2000 Reg. Sess.); (33) Texas, TEX. EDUC. CODE §§ 12.101 -- .120 (West, WESTLAW through 1999 Reg. Sess.); (34) Utah, UTAH CODE ANN. §§ 53A-1a-501 – 514 (WESTLAW through 2000); (35) Virginia, VA. CODE ANN. §§ 22.1-212.5 -- .15 (Michie, WESTLAW through 2000); (36) Wisconsin, WIS. STAT. § 118.40 (WESTLAW through Feb. 1, 2001); (37) Wyoming, 2001 Wyo. Sess. Laws 207 (to be codified as WYO. STAT. ANN. §§ 21-3-301 – 314).

[2] D.C. CODE ANN. §§ 31-2801 – 2853.52 (WESTLAW through 1999).

[3] P.R. LAWS ANN. tit. 18, §§ 2501 -- 2585 (LEXIS through Dec. 1998).

[4] U.S. Dep't of Educ., *Overview of Charter Schools*, (visited May 22, 2001) <http://www.uscharterschools.org/pub/uscs_docs/gi/overview.htm>.

[5] Furthermore, the constitutions of several charter school states contain constitutional provisions that require states to spend money only for public purposes. The public purpose provision of the New Jersey constitution, Article VIII, § 3, states: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

[6] 566 N.W.2d 208 (Mich. 1997).

[7] 89 Cal.Rptr.2d 745, 754 (Ct. App. 1999).

[8] 727 A.2d 15 (N.J.Super. 1999); *aff'd* 753 A.2d 687 (N.J. 2000).

[9] On appeal, the New Jersey Supreme Court upheld the lower court's decision with little comment.

[10] State *ex rel.* School District No. 3 v. Preston, 140 P. 350 (Wash. 1914).

[11] *Council of Orgs.*, 566 N.W.2d at 218.

[12] *See* L.K. Beale, Note and Comment, *Charter Schools, Common Schools, and the Washington State Constitution*, 72 WASH. L. REV. 535 (arguing that Washington's proposed charter school statute would have violated state's constitutional duty to provide a "general and uniform" system of public schools).

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[13] *Wilson*, 89 Cal.Rptr.2d at 752.

[14] *Id.*

[15] William Haft, *Charter Schools and The Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023 (1998).

[16] MICH. CONST. art. VIII, § 3.

[17] 17 P.3d 1125 (Utah 2001).

[18] UTAH CONST. art. X, § 3.

[19] 984 P.2d 639 (Colo. 1999).

[20] COLO. CONST. art. IX, § 15.

[21] *E.g.*, McDuffy v. Executive Off. of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989).

[22] *Palisades Charter School*, 753 A.2d at 697

[23] D. HOWARD NELSON, EDWARD MUIR & RACHEL DROWN, *VENTURESOME CAPITAL: STATE CHARTER SCHOOL FINANCE SYSTEMS* (2000).

[24] In *In re Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park*, Nos. 10-98 & 12-98 (May 11, 2000) <http: // www.state.nj.us /localmandates /hpde.pdf>, the New Jersey's Council of Local Mandates held that the State Board of Education's amended definition of "local levy budget per pupil" in its charter school regulations was an unfunded mandate in violation of Article VIII, § 2, paragraph 5 of the New Jersey Constitution. An unfunded mandate directs expenditures for the implementation of a law without offsetting resources. The ruling invalidated the regulation's effect of eliminating a district's choice to pay the lower of either 90% of the maximum thorough and efficient (T & E) amount per pupil or 90% of the program budget.

[25] *Palisades Charter School*, 727 A.2d at 41.

[26] 723 N.Y.S.2d 262 (N.Y. App. Div. 2001).

[27] *Id.* at 267.

FIFTEEN TIPS FOR BETTER DOCUMENTATION OF EMPLOYEE PERFORMANCE

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NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

FIFTEEN TIPS FOR BETTER DOCUMENTATION OF EMPLOYEE PERFORMANCE

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ELA CONVENTION

ALBUQUERQUE, NEW MEXICO

November 16, 2001

1. EMPHASIZE WITH YOUR STAFF THE IMPORTANCE OF EMPLOYEE DOCUMENTATION. Proper documentation is a must, from both a human resources and legal perspective. Promotions can be secured or denied based on effective documentation, and lawsuits can be won or lost depending on the quality of the documentation. Therefore, all employees, particularly those in a supervisory capacity, should be given notice of the importance of proper documentation and the implementation of documentation techniques.

2. TRAIN YOUR STAFF ON PROPER DOCUMENTATION. Untrained employees may unwittingly make mistakes in documentation. Training on employee documentation is essential to ensure uniform application of documentation techniques, especially for supervisory employees.

3. AVOID FIGHTING WORDS. The prose of a memorandum should not read like a hot romance novel or a soap opera. Remember, any documentation you produce may used as an exhibit at a jury trial. The author of the documentation should be perceived as an even headed, rational, and fair person. Avoid words like "outrageous," "stupid," "ridiculous," and other words that might touch the emotions of both employees and jurors.

4. AVOID THE "CC" SYNDROME. Provide copies of documentation only to those individuals with a need to know. Providing copies of potentially sensitive documentation throughout your business organization may lead to possible liability for defamation and create office morale problems.

5. TREAT EVERYTHING YOU WRITE AS IF MIGHT APPEAR ON THE FRONT PAGE OF THE *NEW YORK TIMES*. Remember that spoken words are easily forgotten, but written words can last thousands of years (*e.g.* the Ten Commandments). While your heart may be pure in writing a memorandum, your words must be carefully chosen to avoid misinterpretation. Accordingly, draft each piece of documentation in a businesslike manner, and say only what you mean. Flippant statements can be easily misconstrued.

6. REMEMBER THAT SOMETIMES WHAT REALLY COUNTS IS WHAT YOU DON'T SAY. Verbose, convoluted documentation, though well intended, often causes more problems than it cures.

"Diarrhea of the mouth" is not a virtue when it comes to employee documentation. In documentation, say only what needs to be said and stop.

7. **USE DOCUMENTATION IN BOTH A POSITIVE AND NEGATIVE MANNER**. Often, people think of documentation as being used only for negative or punitive reasons, such as reprimanding or terminating an employee. While documentation is important in these areas, it is equally important to reward superior employee performance. Memoranda or letters of commendation can go a long way toward raising morale and improving employee performance. Therefore, do not give employee documentation merely a negative connotation.

8. **COME TO A CONCLUSION**. Sometimes an investigation of alleged employee misconduct will be conducted. A thorough investigation and witness interviews will occur, but no conclusion is made in writing. Remember, an investigation may be an important part of a lawsuit tried in court to jurors later. Do not leave an incident hanging. Come to a conclusion on employee investigations and other matters, and reduce your conclusion to writing so the record is complete.

9. **CONSIDER THE NEED FOR DOCUMENTATION PRIOR TO REDUCING YOUR THOUGHTS TO WRITING**. Sometimes, supervisors believe that every violation, no matter how minor, should be documented. As a result, a huge stack of documentation is collected against a particular employee, raising the inference that the supervisor was simply "out to get" the employee. Use common sense in determining whether documentation is necessary. A scathing letter of reprimand for an employee arriving to work five (5) minutes late in most cases is not justified. Ask yourself the following question before reducing a particular event to writing: "Is this event sufficiently serious to warrant documentation?"

10. **BEWARE OF THE EVILS OF EMAIL/INTERNET**. The information super highway is sometimes like the German Autobahn - things move very fast, and the chance for an accident is very real. Caution both yourself and your employees on the downsides of email and the internet. While they are both wonderful tools at mass communication, the text of an email can be easily misinterpreted in the future. (Just ask Bill Gates during the recent Microsoft antitrust trial.)

11. **DO NOT DOCUMENT IN A FIT OF ANGER**. Sometimes, employees may do things which anger you. The worst reaction is to immediately sit down and draft a letter of reprimand. Your writing may more reflect your anger than a rational analysis of the event which gave rise to the memorandum. Do not write anything out of anger. Rather, give yourself a reasonable time to collect your thoughts before documenting an event.

12. **USE COMMON VOCABULARY**. The use of highly technical prose or big words in documentation should be avoided. Draft your documentation so a layman can understand it. You need to appear down to earth through your documentation, not like some "high tech geek".

13. **BE SPECIFIC**. Vague statements in documentation can be confusing and easily misconstrued. Be precise in your writing. For example, if you are referencing a prior memorandum in your documentation, reference the memo by name of author, date, and subject.

14. **FOCUS ON THE PRESENT**. Let past documentation speak for itself. While referencing past documentation is okay, do not try to recreate or paraphrase past documentation in a subsequent memorandum. Attach a copy of past documentation, if necessary.

15. **FOLLOW THE GOLDEN RULE**. "Treat others as you would wish to be treated in a similar situation."

ZERO TOLERANCE IN SCHOOLS: IMPLICATIONS FOR EDUCATORS AND STUDENTS

The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline is a Civil Rights Issue

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THE ROLE OF LAW IN POLICING ABUSIVE DISCIPLINARY PRACTICES: WHY SCHOOL DISCIPLINE IS A CIVIL RIGHTS ISSUE

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The Role of Law in Policing Abusive Disciplinary Practices:
Why School Discipline Is a Civil Rights Issue

Daniel J. Losen and Christopher Edley, Jr.

Introduction

All citizens should be concerned about the rising tide of harsh discipline flooding our public schools. Our democratic values are at stake.1 The wave of school exclusionary policies, in effect and process, is undermining one of the main purposes of public education recognized in law: to prepare children to be effective, responsible members of society and participants in democratic self-governance. For most children, school attendance is their first formal relationship with government. For minorities, the unyielding form of government intervention represented by zero tolerance teaches impressionable youth that the government can take away their right to an education without giving them or their parents a meaningful opportunity to be heard.

The message of zero tolerance is clearly one of obedience, not participation. It reinforces in all children, and especially minority children, that they are excluded by, and powerless against, the government.

The use of suspension and expulsion for school-aged children, except as a measure of last resort, also contradicts our fundamental understanding of child development. As two leading child psychiatrists, James P. Comer and Alvin F. Poussaint, have written, "When punishment is necessary, it should not be harsh and traumatic for minor incidents. When parents, teachers, principals, and others convey to the child that we want you, like you, and would like to have you in this school and this classroom, but there are certain things we expect of you, the response is often miraculous."2 Overly harsh punishment, on the other hand, "either destroys a child's spirit, has no effect at all, worsens the problem, or makes it more difficult...to work with the child in school."3

The statistics on school discipline are deeply disturbing. According to the United States Department of Education's Office for Civil Rights (OCR), our annual suspension rate has nearly doubled since the mid-1970s, from 1.7 million students in 1974 to 3.2 million in 1998.4 While fights or aggression are among the most common offenses, "suspension is also commonly used for a number of relatively minor offenses....In fact, students are suspended for the most serious offenses (drugs, weapons, vandalism, assaults on teachers) relatively infrequently...and with greater frequency in urban areas than in suburban or rural schools."5 This frequent use of suspension for minor infractions occurs despite the fact that removal from school can have a profound impact on minority students, may do irreversible damage to self-esteem, and cause negative attitudes about school.6

Moreover, in 1998-99, African-American students accounted for 33 percent of all those suspended and 31 percent of all those expelled, yet made up only 17 percent of all students.[7] Furthermore, earlier data show that on a national scale, boys of most racial and ethnic subgroups, including white boys, are overrepresented and are always disciplined more harshly than girls from the same subgroup.[8]

When race and gender are combined, statistics show that African-American males are disciplined more often and more severely than any other group.[9] According to the U.S. Department of Education's publication, The Condition of Education 1997, almost 25 percent of all African-American males were suspended at least once over a four-year period.[10] African-American males from the wealthiest families are almost as likely to be expelled or suspended as white males from the poorest families.[11] The overrepresentation of African-Americans among suspended students is consistent with similar data showing criminal punishments meted out disproportionately to minority juvenile offenders.[12]

Special education students are also significantly overrepresented among the ranks of the suspended, in many districts representing one third or more of all suspensions.[13] Improper special education labeling and placement of minority children, and especially the mislabeling of African-American children as having "mental retardation," is a national concern formally recognized by Congress.[14] Therefore, the overrepresentation of children with disabilities in school discipline has particularly strong implications for minority children. Ultimately, many minority children are in double jeopardy of discrimination in discipline, first by race/ethnicity and again by disability.

Ostensibly neutral policies that effectively deny minorities access to equal educational opportunity may be rooted in a social context of intentional discrimination. Historically, minorities, and most notably African-American males, have been branded as dangerous undesirables and targeted for exclusion from school on one pretext or another. African-American students have been suspended and expelled at nearly twice the rate of white students for quite some time, but since zero tolerance has spread across the nation, the suspension and expulsion rate in some minority communities (Durham, North Carolina, for example) has soared to encompass as many as two thirds of the African-Americans enrolled.[15] In Chicago, a tremendous increase in suspensions and expulsions has been noted after new discipline codes went into effect, yet the school district set a goal of doubling student expulsions for the 1999-2000 school year.[16]

Draconian discipline codes, presented as race-neutral safety precautions, perpetuate the marginalization and disenfranchisement of minorities and people with disabilities. Proponents often respond that if minority students are breaking school rules more often, then there is no unfair discrimination in excluding them more often. Children's safety must come first. But as these statistics and at least one recent study suggest, minorities and students with disabilities are receiving more frequent, severe, and longer-lasting punishments for both violent and nonviolent misbehavior compared with similarly behaving majority students.[17]

The point of civil rights law is to protect the powerless and disenfranchised from the tyranny of the majority. Since the 1994 passage of the Gun-Free Schools Act, requiring automatic discipline for gun and drug possession, expansive "zero tolerance" policies, which go far beyond guns and drugs to encompass everything from bad language to absenteeism, were implemented by state and local officials, who were typically neither minorities nor persons with disabilities.

Some argue that the "tyranny of the majority" concern is diminished by the fact that minority as well as white school authorities have backed zero tolerance policies. But the advent of zero tolerance needs to be considered in a larger national context. Swept up in a political maelstrom, government officials at all levels have been responding to the "get tough" demands of their constituents. Equally concerned with school safety as their white counterparts, and with few questioning the efficacy or fairness of zero tolerance, minority politicians and school authorities have been under great pressure to embrace stricter discipline measures. Abuses in meting out discipline existed long before zero tolerance became a buzzword, but news of the gross disparate impact of school disciplinary policy on minority youth and students with disabilities nationwide has only recently been brought to light by civil rights activists.

When school policy is at issue, courts often defer to the authority of educators. The rationale invariably refers to the courts' lack of expertise and the sanctity of local control over public schools. As a result, many practices such as tracking and high-stakes testing, which harm minority and poor children disproportionately, have been allowed to stand. But where policies have caused complete exclusion from school, as zero tolerance does, the Supreme Court has sometimes expressed greater willingness to scrutinize the educational justification.18 Nonetheless, to stop this tsunami of intolerance, advocates must develop more effective media, policy, and legal arguments.

This essay examines the legal framework for challenging discriminatory educational practice based on race or ethnicity. The next section describes avenues through which to challenge zero tolerance under civil rights statutes. Part three provides guidance to lawyers, community activists, and parents. However, this general writing should not be considered "legal advice." Because each case is unique, it is always advisable to speak with an experienced attorney before acting.

The legal framework for challenging zero tolerance can serve a dual function: to inform legal strategy and to serve as a touchstone for policy debates and political action. Because court challenges are expensive and time consuming, we recommend extra-legal community responses that keep one foot in the courthouse door. This essay concludes by suggesting a parallelism between racial profiling on the highways and the disparate identification of minority students as rule violators in our schools.

I. The Equal Protection and Title VI Framework

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964 each prohibit discrimination on the basis of race, color, and national origin. The Constitution applies to all schools, and Title VI applies to all schools that receive federal funding (virtually all do). There are other constitutional rights implicated, but not addressed here, such as First Amendment rights and "due process" rights. In the latter, parents can challenge a decision to suspend or expel for lack of notice or if a hearing was not properly held. Challenges on the basis of inadequate process are important, but are only relevant to a discrimination case if a minority child was denied the same process as a white child. However, as Nadine Strossen has pointed out, "It is no coincidence" that the leading case on school discipline and due process, Goss v. Lopes, "involved the sweeping, indiscriminate suspension of black students from Columbus, Ohio, public schools for allegedly taking part in demonstrations following Black History Month."19

Students and their advocates should also be aware of state constitutions and state statutes that offer similar or even more extensive protections against zero tolerance policies. Some states, for instance, guarantee the fundamental right to education, a right that is not guaranteed under the federal Constitution. Many states also have administrative agencies that focus on educational rights or on the enforcement of state antidiscrimination laws. Students and their advocates should consult with attorneys and education specialists for more information on state laws.

The two basic legal frameworks for challenging racial discrimination in school discipline are called different treatment and disparate impact. These two challenges also apply where the alleged discrimination is on the basis of gender or disability. Although beyond the scope of this essay, readers should know that there are critical additional legal safeguards against discrimination in discipline on the basis of disability.20

Readers should also note three important caveats about these challenges. The first is that the Title VI "disparate impact" cause of action is only available under the regulations. Second, the Supreme Court recently ruled in Alexander v. Sandoval that there is no "implied right of action" to enforce the Title VI disparate impact regulations in court.21 However, Justice Stevens, dissenting, stated that it was "likely" that plaintiffs could still enforce the disparate impact regulations in court under a civil rights statute called "Section 1983" (42 U.S.C. 1983, a provision of the Civil Rights Act of 1871, which was enacted after the Civil War to secure the rights of African-Americans). This important legal distinction means that court actions against public schools might still be viable, despite the Sandoval ruling. Further, the ruling in Sandoval does not change the fact that a public school district can be challenged on disparate impact grounds in a complaint made to the Office for Civil Rights. Third, the "different treatment" legal framework, although available under both Title VI and the Constitution, requires proof of intent as illustrated in the examples below.

a. Different Treatment

While investigating a 1995 complaint against the Benedictine Military School in Georgia, the United States Department of Education Office for Civil Rights found that white students who had committed similar offenses as African-American students received substantially lighter sanctions. The school's discipline system was based on a point system for infractions, a disciplinary committee that met when a student reached 20 points, and a headmaster's discretion to accept or reject the committee's recommendations. OCR revealed that African-American students were routinely expelled under the point system but white students were neither expelled nor suspended for similar and even graver offenses.22

Most allegations of different treatment in discipline are not systemic challenges like the one above, but are brought by parents when they believe their own child has been disciplined unfairly. Despite some blatant examples, it is often difficult for parents to find enough proof of different treatment to be successful in court. Advocates and investigators have expressed a need for careful preparation in bringing a different treatment claim and suggest that all the counterarguments should be considered first. For example, if the minority student had a longer history of infractions, that difference may justify a harsher punishment for a subsequent offense.

Parents should enlist help to review disciplinary statistics and interview students in order to establish forceful claims under different treatment. In some cases, it may be wise to enlist the support of a community group to help gather a series of examples from the same district that depict a pattern of different treatment over time. Moreover, for an administrative complaint, community groups should also gather witnesses who can testify to federal investigators about their perception of the discipline code. However, parents must consider the time limits for filing complaints before they delay their claim. Once filed, claims can sometimes be joined by others. In the end, the collected evidence may prove extremely valuable to media and policy debates. Schools may be more willing to reach a negotiated settlement and change their policy if the facts of a specific case generate public outcry. But anecdotal evidence is even more effective when multiple claims are made and the statistics shout, "This is not an isolated injustice!"

b. The Intent Standard

The most difficult obstacle to proving discrimination is the fact that under the Constitution, and Title VI, the courts require plaintiffs to show proof of intentional discrimination. Parents and advocates, however, should not be too discouraged by this legal hurdle. Under the regulations to Title VI, a claim of "disparate impact" (see next section) can be brought and proof of intent is not required to make the case. A "different treatment" claim, on the other hand, does not escape the intent requirement, even under the regulations.

Intent can be established from statements or writings of policy makers, disciplinarians, and witnesses. In one successful case handed down in 1985, the court cited evidence that faculty members had referred to African-American students as "niggers," "blue gums," and "coon."[23] The court also highlighted the testimony from one teacher who had witnessed another administer corporal punishment to an African-American student until the child's skin was ruptured and bleeding, but who had never seen a white child subjected to such harsh punishment in her nine years at the school.[24]

In some cases where direct evidence is sparse, there is a way around the "intent" requirement that does not rely on the "disparate impact" regulations. In some states, if the school district is under a court order to desegregate, and the current effect of a zero tolerance policy can be tied to prior unlawful school segregation, the court may allow a plaintiff to prevail, without requiring new proof of intent.[25] The reasoning behind this desegregation exception is that if a school policy that has a racially adverse impact is connected to the old segregated system, the past intentional discrimination is still at work and the unlawful intent may be presumed.[26] Parents and advocates wishing to challenge a district's zero tolerance policy should request records directly from a court and from the school district to discover whether the district in question is under court order, and if so, whether discriminatory discipline had been raised as a concern in the past.[27]

c. No Intent Required-Disparate Impact Under the Regulations

Parents suspecting unlawful discrimination can sue in court or file a federal complaint with the Office for Civil Rights. To date, "disparate impact" issues have been raised infrequently compared to allegations of "different treatment."[28]

Although disparate impact claims have been underutilized, a number of class-action lawsuits that relied heavily on statistical disparities have resulted in productive settlements. In Ross v. Saltmarsh, for example, the court required the school district to set a goal to reduce the overall number of suspensions in order to reduce the racial disparity in suspensions.[29]

It is important to note that the Title VI regulations, setting forth the disparate impact grounds, were developed so that subtle forms of intentional discrimination could be scrutinized. The doctrine also represents Congress' intent to protect historically oppressed groups from facially neutral actions that pile on additional disadvantages.

Specifically, the Title VI regulations make it unlawful for a school to use "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin."[30] In other words, an "effects test" can be applied to the discipline policies of a school or district even when all agree that the policies were not intended to discriminate and that there is no direct evidence of bias or "different treatment."

II. What Can a Concerned Citizen Do?

Parents and advocates should always consider filing both a "different treatment" and a "disparate impact" complaint. Furthermore, nonlegal challenges should be pursued simultaneously with legal ones. For both disparate impact and different treatment claims, true stories of different treatment for nonviolent behavior are especially compelling.31

Schools often successfully counter claims of different treatment by referring to each student's history of misconduct, or by highlighting the very specific nature of each infraction. The core argument is that because every incident and every offender is different, different treatment may be warranted. In some cases where schools have adopted strict zero tolerance policy for categories of misconduct, these justifications for different treatment may be difficult to maintain.

Most important, a school may have a harder time, technically, defending against a "disparate impact" claim than a "different treatment" claim. Parents and advocates should point out to school boards and the media that any school policy can constitute unlawful discrimination if it fails the "effects" test described in the regulations. There are limitations on who can file a lawsuit in court, but advocates should keep in mind that any concerned citizen can bring a discrimination complaint on behalf of another individual or group in an administrative action.

a. Making a Disparate Impact Argument

Legally, a disparate impact claim should be treated in the following manner:32 (1) First, it must be established that the students who were disciplined are members of a protected racial or ethnic group;33 (2) the complaining party must establish that a district or school policy has a negative effect on the identifiable ethnic or racial group, and that the disproportionality is great enough that it is unlikely to have occurred by chance;34 (3) once the complaining party satisfies these two elements, the burden shifts to the school district to show that the policy is an educational necessity; and (4) if the school provides a justification, parents and advocates may challenge the justification and/or show that a less discriminatory alternative could achieve the same purpose.

b. Educational Necessity?

In a disparate impact case, once the challenger establishes a significant statistical disparity, the school district must justify the policy. However, a school would likely defend such a policy by saying it serves the necessary educational purpose of maintaining a calm and safe learning environment. It may bring in state educational officials or other school personnel to attest to the importance of zero tolerance. Because judges generally defer to the judgment of school officials, courts have rarely required school systems to provide extensive proof that the policy is necessary or effective in meeting its purpose.

c. Overcoming the Educational Necessity Defense

Formulating an effective response to a school's justification is critical to legal arguments, public policy debate, and media discourse. In attempting to discredit a school's justification, advocates should always differentiate "zero tolerance" from firm and consistent school discipline to avoid being painted as opponents of discipline per se. Parents and advocates should prepare to: (1) undermine the school's justification directly, and/or (2) describe less discriminatory alternatives that would not be unreasonably expensive to implement. If the complaint is filed with the United States Department of Education's Office for Civil Rights (an administrative agency, not a court), a strong argument can be made that the federal government has the duty, as an enforcement agency, to scrutinize the justification. If the justification is sound, OCR should search for reasonable alternatives with less discriminatory impact and only side with the school if none can be found. But the depth of OCR investigations may vary and complainants should keep close track of how OCR is proceeding.

1. Undermining Educational Justifications

One of the most important aspects of a legal challenge is the highlighting of the negative disparate outcomes. Whenever possible, parents and advocates should use distinct examples to counter claims that harsh discipline is necessary to maintain a safe, calm, and productive learning environment. There is rarely an educational justification for automatic zero tolerance for nondangerous behavior. The underlying principle of our federal education laws (and many state constitutional provisions) is that providing education for all children, including those who present challenges, is a public good. Unlike private schools, public schools don't get to pick and choose who benefits.

In some cases, where there are no improvements in a school's test scores after dropouts are accounted for, a parent or advocate can point out the lack of evidence supporting the claim that a zero tolerance is necessary for learning to take place. Where a challenged policy is fairly new, a school will likely point to other communities where a similar policy has "worked." Opponents should be prepared to question the credibility of the district's testimony on this subject by bringing in expert witnesses and by demonstrating that there are communities where similar policies have failed to make an improvement. In some cases, the policy may have been borrowed and then distorted. If a school claims to be adhering to a certain recommended approach, challengers should contact the designers to find out whether the school district has implemented the original design appropriately.

A. Countering the Fair Process Defense

Challengers may encounter the argument that zero tolerance should not be rebuttable so long as the process is fair. In response, parents should stress that the disparate impact argument is well established in the employment context. The Supreme Court held that neutral employment tests and other hiring criteria were considered discriminatory if they were unnecessary for the job at hand or if the same information about the prospective employee could be obtained in a way that did not diminish the chances of minority applicants.35 The fact that an unnecessarily harsh discipline policy may be carried out with neutrally administered due process for all does not protect it from legal challenges arising from its disparate impact.

B. Questioning Claims of Deterrence

Once the fair process argument is addressed, the deterrence-as-educational-necessity argument must still be grappled with. Claims of successful deterrence must be viewed critically. Some schools point to reduced suspensions in concurrent years to claim erroneously that zero tolerance is helping students learn to improve their behavior. Statistics that may support such claims often fail to account for the fact that many disciplined students never return to school. They may attend alternative schools, drop out, or become incarcerated, but they do not necessarily return as better citizens for their experience.36 Along these same lines, suspension rates can be reduced by making suspensions last longer, particularly because many disciplined students are repeat offenders. Whenever schools insist their discipline policy has been effective, plaintiffs should challenge the defending districts and the media to find and publicize statistics on discipline, attendance, and graduation rates that actually follow cohorts of students from grade to grade.

National claims of successful deterrence should also be viewed critically. For example, the Report on State Implementation of the Gun-Free School Act: School Year 1997-1998 (U.S. Department of Education 1999), depicts a decrease in the number of students expelled for carrying a firearm, from 6,093 to 3,930 in 1996-97. However, the drop may be due to the fact that in the 1996-97 report, many schools did not distinguish between weapons and firearms.37 The drop may also be due to better and more accurate reporting.38 Dr. Paul Kingery, who has worked on the report, stated that if only the statistics on firearms were used, there may have in fact been an increase.39

Furthermore, if zero tolerance is truly "teaching children a lesson," then the success must be judged by looking at the victimization rate of children both in and out of school.40 Advocates should frame the debate in terms of broad community interests. For example, a recent report in a South Bend, Indiana, newspaper highlighted a recent spate of murders in the community by 12 African-American boys.41 The article pointed out that all were of school age, but only two had attended school that year. Where violence rates among youth continue to rise outside of schools, expulsion and suspension reductions from year to year do not evidence a lesson learned. Therefore, advocates should document crime rates among youth outside the schoolhouse, the increasing costs of incarceration, and the burden incurred by citizens in their communities. Interviews with those who work with juveniles and with others concerned with rising crime among children on the streets should be pursued for anecdotal evidence of the dangerous impact of zero tolerance.

2. Challengers Should Offer Less Discriminatory Alternatives

The other critical concept to convey is that there are school disciplinary strategies that both ensure safety and respect civil rights. By bringing to light effective violence intervention programs that do not rely on zero tolerance, advocates can provide constructive criticism that may support a negotiated settlement or political remedies such as requesting that the school board repeal or amend the policy. Educational psychologist Russ Skiba testified before the United States Commission on Civil Rights that some schools use more graduated systems of firm discipline, in which severe consequences are reserved for the most serious offenses, with more moderate responses used for less serious behavior.42 Whenever possible, challengers should provide examples of viable alternatives that have excluded fewer children and lowered the racial disparity in discipline. In any event, if parents and advocates can gather statistical evidence of a significant disparity, the parties may reach a settlement and avoid a protracted give and take on these questions.

d. Be Wary of Alternative Schools

Anecdotal evidence indicates that alternative schools can be harmful places for children, and that minority children are more likely to be transferred to them for discipline reasons. For example, in 1999, the superintendent for Palm Beach County, Florida, entered into a resolution agreement with OCR to address a race- and disability-based complaint regarding the district's use of alternative education programs.43 Upon further investigation,44 OCR found "significant disproportion" by race in the number of African-American students involved in incidents where law enforcement became involved, and significant disparities in the rate of referrals and the meting out of discipline to African-American students for a wide range of offenses.45

Further, the idea of isolating "at risk" children is generally regarded as a recipe for failure and distinctly frowned upon in the area of special education research and law.46 Systemic challenges sounding in both Title VI and disability law may be effective in curtailing the inappropriate use of these programs.47 Unfortunately, some politicians appear willing to commit large numbers of poor and minority children to experimental institutions. For example, the State of Illinois passed a law on May 21, 2001, that allows schools to transfer to alternative school programs those children it labels "at risk."48 This broad category includes any student who is either "at risk of not meeting the Illinois Learning Standards or not graduating from elementary or high school and who demonstrates a need for educational or social services beyond that provided by the regular school program."49 This new law explicitly enables districts to provide alternative programs by contracting with juvenile justice agencies and programs operated by the department of corrections.50

Parents should be concerned that zero tolerance policies, when coupled with a proliferation of "alternative" schools, could fuel an abusive reliance on alternative programs. As a result, one could expect an increase in the likelihood that "at risk" minority children are isolated in separate schools, where they will receive watered-down curricula, have few positive peer models, and be held to low expectations by unqualified instructors. Although some good alternative schools may exist, parents should be wary that an alternative school might be another conduit for the school-to-jail pipeline.

e. Filing Administrative Complaints

The Office for Civil Rights has 12 regional offices. However, parents and advocates should carefully consider the reputation of the OCR office for their region, because the agency can label the complaint as meritless or negotiate an agreement that does not require the district to make significant changes. OCR prefers negotiated settlements, and if a case has merit, it will usually pressure both parties to reach a settlement short of a hearing. The following summary of a recent challenge may provide a useful window into OCR's practice when the agency has conducted a thorough review.51

In June of 1996, a complaint was filed against the Alameda High School in Alameda, California, stating: (1) a racially hostile environment existed with respect to Latino students; and (2) Latino students were treated differently compared to white students in the number of referrals and suspensions and in the severity of discipline received for the same or similar offenses.52 OCR requested and received relevant data from the school over a three-year period of investigation and negotiation. During that time, OCR interviewed parents, students, and administrative staff, and inspected student files and discipline records.

Although OCR found the evidence of "different treatment" to be inadequate, OCR's investigation revealed that the rates of discipline of Latino and African-American students were disproportionately high. The disparity was most notable in a number of discipline categories including "defiance of authority." OCR worked with the school to reduce the discipline rate in all its high schools. Particular attention was spent on how defiance of authority incidents had been distributed across racial and ethnic lines. Between 1996 and 1999, the District reported to OCR its progress in addressing the disparity and over this period, according to OCR, successfully reduced the discipline rates for all students within an acceptable range.53

This example involved a disparate impact analysis, but a survey of reported cases suggests that OCR more often processes discipline complaints under the intentional discrimination standard, or limits its investigation to the specific issues raised in the complaint.54

In addition to overcoming the potential legal obstacle presented by the Sandoval decision, the most significant advantages to filing with OCR are: (1) it costs very little and parents can file claims on their own; (2) OCR has broad investigation powers and can access information from schools and school districts more rapidly than plaintiffs, which may save time for advocates given the time allowances for full discovery; (3) OCR will engage the school district in negotiations early on when evidence suggests a violation; and (4) OCR can require a school to collect certain kinds of statistical data that might be unavailable to an attorney suing in court. A school's data on discipline is often inadequate. For example, a school may record disciplinary action but not the details of the offense or length of suspensions, and not all schools collect data on discipline disaggregated by race or ethnicity. If it believes the information is needed, OCR can have a school reconfigure data that it has collected or begin collecting the information OCR requests. Furthermore, OCR data, reports, and other information will be provided if requested through a Freedom of Information Act request. Advocates suing in court face more obstacles in gaining the data needed to prove the case.

There are, however, pitfalls in pursuing an administrative remedy. Although OCR may not refuse to investigate cases that have merit, they may view the facts in a very conservative light if they are under political pressure to close a case. With so many politicians at the federal level spouting zero tolerance rhetoric, these pressures may come to bear on OCR's willingness to dig for information in the course of an investigation.

The depth and quality of OCR's investigation and negotiation also can vary significantly. Parents and advocates should take advantage of the fact that OCR attorneys will "provide technical assistance" by telephone or in person without requiring a complaint to be filed. This free advice, which should be requested as 'technical assistance," can give potential complainants a sense of how the specific office of OCR would deal with their case if it were to be filed. It may also be useful to ask OCR to send a representative to attend a meeting of organized parents to discuss their concerns even before a complaint is filed.

f. Legislative and Extra-Legal Regulatory Actions That Can Be Taken

While advocates should seriously consider lawsuits, even if legal technicalities pose difficult obstacles, amending a law or policy is likely easier than getting it repealed by a judge. Most school districts have adopted a zero tolerance policy in one form or another. Where policies remove discretion or require harsh penalties for minor offenses, political action on the federal, state, and local level may be the most effective response. Because state constitutions may afford more education rights, state or local policy forums may be better venues for initiatives seeking to limit the scope of zero tolerance policies. In some districts, as a first step, parents and advocates may have to prevent an already harsh discipline policy from being expanded. Preventing a new policy from being created is usually easier than overturning a policy.

Parents and advocates can also help organize local and state support for a national movement that is zeroing in on intolerant and abusive discipline practices. Parents and students can get involved in groups like the NAACP, Southern Echo, Rainbow/PUSH Coalition, and the National Coalition of Advocates for Students who are moving forward on this and related issues. Putting pressure on OCR to take more effective action against schools with abusive discipline policies is part of a national strategy. As part of this effort, some of these groups may be organizing OCR campaigns by systematically filing strong complaints of disparate impact and different treatment with the agency.55

g. Broad-Based Community Action Strategies

Parents and advocates should not get discouraged too easily by the conservative rulings of courts. Court fights provide an opportunity to get the media to pay attention to the gross injustice minority children must cope with in school. Court battles that have lost but received media attention have also served as conduits for newfound political energy. Administrative complaints filed with OCR can also attract media attention if the press is made aware of them. In the end, to stem the tide of harsh discipline drowning minority youth, it is the general public that must be first engaged and then enlightened.

1. Participation at Board of Education Meetings

For obvious reasons, parent involvement is critical to political solutions. Parent involvement can also lay the groundwork for legal action. That is because it takes parents to produce child plaintiffs and child witnesses, and involved parents will likely be the first to notice discriminatory patterns of discipline. Parents are especially influential when they bring their children with them and testify at school committee meetings, although the legal and privacy interests of the children should always be carefully protected. Organized presentations can have an immediate impact and can have great influence if covered by the local media; pressure can be enhanced if it is applied in tandem with legal or administrative action.56 When addressing school boards, community groups should include the following points:57

Fair discipline is where the disciplinary consequences match the misbehavior. All children benefit from discipline that teaches appropriate social conduct effectively.

Fair and effective discipline improves the safety of the entire community, inside and outside of the school.

Overly punitive discipline is neither fair nor effective.
A fair and effective policy should not result in children of some racial or ethnic groups being suspended and expelled significantly more often than others for minor offenses.

Advocates should also press school boards to consider at least the following actions:

Implement a proven effective discipline policy where punishments are fair and crafted as opportunities to teach children appropriate behavior.

Decrease size of "regular" classrooms, so teachers can better address the problems of all students.

Increase teacher training in conflict resolution, provide teachers more support in the classrooms, provide better supports for children who appear difficult to manage, and implement programs that will increase effective early intervention.

Train teachers so that they are multiculturally aware and able to implement positive classroom-management policies for students from diverse backgrounds.

Involve members of the community in developing student codes of conduct for the school district, and hold parent and student training on the codes of conduct to ensure that everyone understands their rights and responsibilities.

Limit circumstances under which police may be called to school to deal with disciplinary issues. Include that a school must call a parent immediately if a child is arrested.

Establish a disciplinary committee at each school that includes parents and students and people of color. The committee should be given the authority to review serious disciplinary decisions, hold hearings, and overrule a decision.

Compile data on discipline that breaks out recorded violations by type of misconduct and punishment and disaggregates the data by race, gender, age, and disability status.

2. Gather Information

Gathering information sends a message that legal action is just around the corner. In the short term, the anticipation of a well-supported lawsuit may make districts more willing to rethink their discipline code. Even if legal action is not part of the plan, gathering the kind of information necessary for a lawsuit - the data, the identification of education experts, and the names of parents and children with compelling stories to tell - will enhance and inform a media campaign, legislative effort, or attempts to influence a school board. Spreading information about the alarming patterns and disturbing injustices will paint a stark picture for public viewing and can change the debate paradigm from an exchange of rhetoric to speaking truth to power.

3. Apply Pressure to Gain "Telling" Data

As community members attempt to collect data, they will also pressure schools to collect more and better data. Activists working politically and those pursuing legal action should keep in mind the intermediate goals of requiring more accurate information about children who are disciplined. On the state and federal level, pressure is already mounting for more uniformed reporting on school suspension and expulsion. Legal action and intensified political pressure can help speed up the process. A school board that has adopted zero tolerance will be more likely to compromise and agree to improved recordkeeping requirements, including recording and reporting disciplinary actions by race and ethnicity, than to rescinding the discipline policy. The same will likely apply to settlements stemming from lawsuits and OCR complaints. Many civil rights advocates believe that more accurate information will be critical to both legal and nonlegal zero tolerance challenges in the long term.

III. Conclusion

The information battle has strong parallels to the fight against racial profiling practiced by highway police. If detailed data on police stops were collected routinely and made public, advocates believe they could better demonstrate the degree of discrimination, the ineffectiveness of racial profiling for drug interdiction, and the relative benefits of less discriminatory enforcement policies.

The infliction of broad-based zero tolerance on school children in many ways resembles the racial profiling of African-American drivers. The staggering statistics suggest that teachers monitor the behavior of minority students more closely and are more likely to refer them for disciplinary action. Racial profiling on our highways is justified on the basis of drug interdiction: zero tolerance equals violence prevention.

Given the policy's origins as a narcotics enforcement scheme, it is not surprising that zero tolerance has come hand in hand with the erosion of privacy and free-speech rights for children. Schools are increasingly filing criminal charges against students, using metal detectors, locking down classrooms, placing surveillance cameras in hallways, requiring drug tests for participation in sports, making random locker searches, interpreting drawings as criminal threats, and even equipping school police with shotguns.58 Time magazine recently ran a major story about profiling computer programs designed to spot unknown dangerous students lurking in the midst of normal children by electronically scanning their school records and a variety of other factors.59 The FBI reportedly has "school shooter" profiling software that highlights as indicators: having parental troubles, experiencing a failed romance, and listening to songs with violent lyrics.60 The police in New Jersey and California, including the under-siege Rampart neighborhood officers of Los Angeles, now admit that they practiced racial profiling because they believe it works.

"Children are not only being treated like criminals in school, but many are being shunted into the criminal justice system as schools have begun to rely heavily upon law enforcement officials to punish students."61 And in Texas, juvenile justice officials handle the alternative education for every excluded student. Schools must be denied the use of criminal justice approaches as a tool to reform school behavior. The tide of fear that is eroding liberty and educational opportunities, especially for minority students, will unlikely peak on its own. Communities throughout the nation must wage a serious challenge to the proffered educational justification of zero tolerance. This essay has outlined a range of steps to take that we believe will be effective if put into action.

NOTES

1. See Betsy Levin, "Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School." 95 Yale Law Journal 1647 (1986).

2. See James P. Comer, M.D. and Alvin F. Poussaint, M.D., Raising African-American Children, at 197-198 (1992); see also Barbara Townsend, "The Disproportionate Discipline of African-American Learners: Reducing School Suspensions and Exclusions," Exceptional Children 66, 3, pp.381-391, at 388 (2000); Kevin P. Dwyer, David Osher, and Catherine C. Hoffman, "Creating Responsive Schools: Contextualizing Early Warning, Timely Response," Exceptional Children 66, 3, pp.347-365, at 349 (2000).

3. Comer and Poussaint, supra note 2

4. That represents an overall increase from 3.7 percent to 6.9 percent. See Robert C. Johnston, "Federal Data Highlight Disparities in Discipline," June 21, 2000, Education Week on the Web, http://www.edweek.org/ew/ewstory.cfm?slug;eq41zero.h19.

5. See Russell J. Skiba, Professor of Counseling and Educational Psychology at Indiana University, Research Review Submitted to the U.S. Commission on Civil Rights, February 9, 2000, at 21 (Washington, D.C., Feb. 18, 2000).

6. As Barbara Townsend states, "When the vast majority of school exclusions are meted out to African-American students who comprise a minority of the school population, it is easy for those students to interpret this disparity as rejection and to suffer from lower self-esteem as a result. A negative collective, self-fulfilling prophecy may develop as a result of the messages that African-American youth receive that they are incapable of abiding by schools' social and behavioral codes....Phenomena such as overrepresentation in special and remedial classes, suspensions, expulsion and other indicators of school failure can have cumulative and disastrous effects on African-American males." See Townsend, supra note 2, at 383 (citations omitted).

7. See Robert C. Johnston, "Federal Data Highlight Disparities in Discipline," June 21, 2000, Education Week on the Web, http://www.edweek.org/ew/ewstory.cfm?slug;eq41zero.h19.

8. See Patrick Pauken and Philip T.K. Daniel, "Race Discrimination and Disability Discrimination in School Discipline: A Legal Statisticai Analysis," 139 Education Law Report 759 (2000).

9. See, e.g. Applied Research Center, Facing Consequences: An Examination of Racial Discrimination in U.S. Public Schools (Mar. 1, 2000) hereinafter ARC Report.

10. Id.

11. See National Center for Education Statistics, U.S. Department of Education, The Condition of Education, 1997 (noting Indicator 48, "Students Who Have Been Suspended From School").

12. See Building Blocks for Youth, And Justice For Some (May 2000) (Research funded by the U.S. Department of Justice).

13. See Kim Brooks et al., School House Hype: Two Years Later 19 (Justice Policy Institute/Children's Law Center, Apr. 2000) hereinafter School House Hype.

14. See Public Law 105-17, June 4, 1997, section 601(7)(f), (8)(A)-(F). Section 601(c)(8)(C) specifically states, "Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart." Id.

15. See ARC Report, supra note 9, at 26.

16. See Suspended Education: A Preliminary Report on the Impact of Zero Tolerance on Chicago Public Schools. Generation Y, a project of the Southwest Youth Collaborative, citing Chicago Public Schools End of the Year Reports to Illinois State Board of Education, 1992-93 through 1998-99.

17. See Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece Peterson, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment" (Paper disseminated at the Summit on Zero Tolerance, Washington, D.C., June 15-16, 2000) hereinafter The Color of Discipline.

18. See Goss v. Lopez, 419 U.S. 565 (1975); Plyler v. Doe, 457 U.S. 202 (1982); Honig v. Doe, 484 U.S. 305 (1988).

19. Nadine Strossen, "Protecting Student Rights Promotes Educational Opportunity: A Response to Judge Wilkinson," 1 Michigan Law and Policy Review, 315, 316 (1996).

20. See Eileen Ordover, "Disciplinary Exclusion of Students with Disabilities," Clearinghouse Review, May-June 2000; see also "Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies."

21. Alexander v. Sandoval, 121 S. Ct 1511 (2001).

22. See In re Benedictine Military Sch., 22 IDELR 643 (1995). In another case described by Norma Cant, the department's assistant secretary for civil rights, a school had implemented a very strict discipline policy in a discriminatory fashion. OCR's investigation revealed that for substantially similar misconduct, African-American students were picked up by the police and given one week of in-school suspension consistent with the policy, while white students received counseling and no suspension or police intervention. See Norma Cant, assistant secretary for civil rights, U.S. Department of Education, Testimony Before the United States Commission on Civil Rights, Washington D.C., Feb. 18 (2000).

23. Sherpell v. Humnoke Sch. Dist., 619 F.Supp.670 (E.D. Ark. 1985).

24. Id.

25. One important caveat: the Fourth, Fifth, and Eleventh Circuit Courts, which have jurisdiction over most of the Southern states, do not allow this presumption in discipline cases. For the remaining 38 states, if a prior desegregation order included a requirement to address a disparity in discipline, then the district's discipline policy may be especially vulnerable to a constitutional challenge. Once a court has declared a district "unitary," however, the district is absolved for having had a segregated school system and the presumption no longer holds.

26. See, e.g., Simmons v. Hooks, 843 F.Supp. 1296 (E.D. Ark. 1994); United States v. Gadsden County Sch. Dist., 572 F. 2d 1049, 1050 (5th Cir. 1978); see also Daniel J. Losen, "Silent Segregation in Our Nation's Schools," 517 Harvard CR-CL Law Rev. 530-32 (1999).

27. To find out whether there is a desegregation court order for cases in which the United States is a party to the case, contact the Department of Justice, Civil Rights Division, at (202)514-4092.

28. Telephone interview with Barbra Shannon, Region IV past director, U.S. Department of Education Office for Civil Rights, Apr. 24 (2000).

29. See Ross v. Saltmarsh, 500 F. Supp.935 (S.D.N.Y. 1980). Although school officials denied any wrongdoing, the district also agreed to convene a committee to address the disparity in discipline and to hire a consultant recommended by the plaintiff to "advise the defendants and work with the school district to develop plans to eliminate racial disparities in suspension rates." Additionally, the district agreed to provide statistical information and create a suspension log for the consultant to review-a semester report showing for each principal or superintendent: name of the student, race, grade, referring teacher, offense, date of suspension, suspending official, date of return and length of suspension. Id. at 940-41.

30. 34 CFR 1003 (b)(2)(1998).

31. Telephone interview with Barbra Shannon, supra note 28.

32. See, e.g., "The Use of Tests When Making High Stakes Decisions for Students," U.S. Department of Education Office for Civil Rights (Draft, July 6, 2000), at 14-15.

33. The defendant must also be a recipient of federal funding.

34. For example, if African-American students constitute 10 percent of a student body population, one would expect black students to constitute 10 percent of those individuals who are suspended under a new zero tolerance policy. But if 20 percent of students suspended under the new policy are African-American, there is a disproportionate impact on the black students. There are, however, no rigid mathematical thresholds for the degree of disparity; the greater the disparity, the more likely that the challenged practice caused the disparate impact. More extensive and elaborate statistical analyses can be performed but discussion of those techniques is beyond the scope of this essay.

35. See Griggs v. Duke Power Co., 401 U.S. 421 (1971).

36. See Sasha Polakow-Suransky, Access Denied: Mandatory Expulsion Requirements and the Erosion of Educational Opportunity in Michigan. A Report by the Student Advocacy Center of Michigan (Feb. 1999).

37. See Suspension draft report, Kingery et al., supra note 23, at 4.

38. Ibid.

39. See interview with Dr. Paul Kingery, director of the Hamilton Fish Institute (HFI), (Apr. 3, 2000).

40. See HFI, supra note 39, at 6.

41. May Lee Johnson, "Black Males' Drop-out Rate Reaches Crisis," South Bend Tribune Online Edition (Apr. 9, 2000), www.southbendtribune.com.

42. See Russell J. Skiba, testimony, supra note 5.

43. The complainant had previously won a Commissioner's Order (Agency Case Number DOE-98-344-FOF), which included a corrective action plan developed jointly among the complaint, district administrators, and bureau staff issued on December 2, 1998.

44. See Cover Letter to Resolution Agreement from Gary Walker, Director, Atlanta Office of OCR to Superintendent Dr. Joan Kowal (Aug. 13, 1999). Despite this agreement another complaint was filed against the district that school year, alleging similar violations. This complaint resulted in a new resolution agreement signed by a new interim superintendent for the district. See Resolution Agreement, Palm Beach County School District, 04-99-1285 (Sept. 7, 2000).

45. See Letter from Gary S. Walker, Director, Atlanta Office OCR (Sept. 7, 2000). OCR's investigation also revealed that the district had disciplined one student with disabilities despite finding that the IEP and current placement was inappropriate, and the district neglected to conduct a manifestation hearing for another student with disabilities suspended for thirteen cumulative days.

46. See 20 U.S.C. Section 1400 et seq. (Individuals with Disabilities Education Act Amendments of 1997). The Act's Congressional findings acknowledge substantial concerns about restrictive and segregated classrooms and conclude that isolated students are usually worse off compared to similarly situated mainstreamed students. 20 U.S.C. Section 1401 (c)(4)(5).

47. See generally, Daniel J. Losen and Kevin Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services (scheduled for publication in The Harvard Civil Rights-Civil Liberties Law Review, Summer 2001).

48. See H.B. 1096, "An Act Concerning Alternative Learning Opportunities." State of Illinois 92nd General Assembly Legislation. http://www.legis.state.il.us.

49. Section 13B-15.10 of Public Act 92-0042. See http://www.legis.state.il.us/publicacts/pubact92/acts/92-0042.html.

50. Section 13-B-20.15 of the same law.

51. See Paul Grossman, Chief Regional Attorney (Region IX), Letter to Dennis Chaconas, superintendent, Alameda City Unified Sch. Dist, re: Docket No. 09-06-1291, Oct. 8, 1999 on file with The Civil Rights Project at Harvard University.

52. The discipline concerns were exacerbated when a white student, who admitted "tagging" a bathroom wall, received no punishment while a Latino youth was suspended for five days for a similar graffiti act. Id.

53. A letter from OCR's chief regional attorney reviewing the school's progress informed the superintendent that the case was closed. Id. The district had initially reduced its rate of disciplinary incidents from 2,527 during 1995-96 to 858 incidents in 1996-97. The district employed a range of strategies, including (1) analyzing its discipline data, disaggregated by race and ethnicity for disparities and reviewing it with staff; (2) developing conflict resolution teams made up of students; (3) creating peer counseling groups; (4) establishing a Latino Boys Club; and (5) holding workshops that directly addressed issues of race. Nonetheless, even though the rates of suspension continued to decrease in 1997-98 year, OCR pressed the school to reduce the disparity in discipline for African-American and Latino students. OCR did not find statistically significant disparate rates for other ethnic groups. The district responded by employing additional strategies, including holding a retreat for administrative staff on diversity awareness and issues regarding racial stereotyping, profiling, and communication styles. OCR reviewed data from the 1998-99 school year and found that in all categories of student discipline, including defiance of authority, Latino and African-American students were within 1.02 points of the target goals. After completing the investigation and negotiations, the agency concluded that the school district did not discriminate against Latino students in the dispensation of discipline or allow a racially hostile environment to exist. OCR closed the case based on a finding of no violation on the original claims and assurances that the district would continue to work toward reducing the discipline rates for African-American and Latino students. Id.

54. See The Civil Rights Project at Harvard University and the Advancement Project, Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies, 35-36, (June 2000).

55. Guidance on how to file a complaint with OCR will soon be available on the Web site of the Civil Rights Project at www.law.harvard.edu/civilrights.

56. See Interview with Abigail Trillen, Children's Legal Services, San Francisco, California (Apr. 26, 2000).

57. See Advancement Project and the Civil Rights Project, "Zero Tolerance Policies and School Discipline: What Are They, Do They Work, What Are Your Child's Rights, and What Can Your Community Do? An Action Kit for Parents and Community Groups" (2000) (on file with The Civil Rights Project at Harvard University). This action kit will soon be available on the Web site of the Civil Rights Project at www.law.harvard.edu/civilrights.

58. Jessica Porter, L.A. "To Equip Campus Police Force with Shotguns," Mar. 4, 1998, Education Week on the Web, www.edweek.org/ew/vol-17/25guns.h17.

59. See Jodie Morse, "Looking for Trouble," Time, Apr. 24, 2000.

60. See Linda Jacobson, "FBI 'Profiling' Help Worries Educators," Education Week, Oct. 6, 1999.

61. See Opportunities Suspended, The Advancement Project and The Civil Rights Project, Harvard University, June 2000. See also education proposal of President George W. Bush, "No Child Left Behind," seeking to circumvent existing due process by giving teachers the authority to remove persistently disruptive students and to amend the Federal Education Rights and Privacy Act to dilute further the privacy rights of children by granting greater access of heretofore private student records to law enforcement authorities. January 2001.

SEXUAL HARASSMENT MEETS ZERO TOLERANCE: LIFE IN K-12 SCHOOLS

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Sexual Harassment Meets Zero Tolerance: Life in K-12 Schools

Introduction: Setting the Immediate Context

On May 24, 1999, the United States Supreme Court ruled in the Davis v. Monroe County (GA) Board of Education case that school districts are legally and financially liable for student-to-student sexual harassment if they knew about it and did nothing to stop it. This case had begun quite a few years before, in Macon, Georgia, in the Monroe County School District. LaShonda Davis was a fifth grader who was touched, grabbed, and verbally harassed by a male classmate. The boy, who is only known by his initials, G.F., repeatedly attempted to touch LaShonda's breasts and genital area, rubbed against her in a sexual manner, constantly asked her for sex, and, in one instance, put a doorstop in his pants and acted in a sexually suggestive manner (Brake, 1999). By no stretch of the imagination was this boy subtle or was his behavior ambiguous; rather, it was persistent and unrelenting.

LaShonda, on the other hand, had not remained quiet or passive. Besides telling G.F. to stop, she also told her teachers. Her parents also complained to her teachers, and asked to have LaShonda's seat moved. But her teachers and school officials did nothing, not even separate the two students, who sat next to each other. After several months of this harassment, LaShonda's grades fell and she wrote a suicide note. G.F.'s behavior was clearly having both psychological and academic consequences. LaShonda's parents filed a criminal complaint against the boy and also a federal civil rights lawsuit against the school district for permitting a sexually hostile environment to exist. In the criminal action, the boy plead guilty to sexual battery. And after five years of legal battles through various levels of the federal court system, the U.S. Supreme Court finally settled the case in a five-to-four decision.

The Supreme Court's ruling in the Davis case also ended years of disagreements among various federal courts in different parts of the country: the ninth (in a California case) and seventh (in an case in Illinois) circuits had held that schools were responsible for peer-to-peer sexual harassment, while the fifth

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(in a Texas case) and the eleventh (where the Davis case came from) circuits ruled in the opposite direction. Until the time of the Supreme Court's decision, confusion reigned nationwide, with courts making contradictory rulings, often over similar sets of facts (Stein, 1999).

The Davis decision was lauded by many, including feminists. But, within a short period of time, it was clear that the Davis decision was being used by those in favor of zero tolerance as yet another excuse to suspend and expel students for conduct much less egregious that of G.F. Davis landed in the midst of the national conversation about school safety, which had been overtaken and unfortunately dominated by the zero tolerance, law-and-order notion of school safety.

The Larger Context of Sexual Harassment in Schools

First, we need to go back a bit into the last decades of the twentieth century, as the term "sexual harassment" came flying into our national discourse, no longer only residing in the realms of workplace discrimination or the vocabulary of feminists, legal scholars, law students, and some school officials. Now, the term "sexual harassment" is everywhere, even in places that we might not want it to be applied, and sometimes we may privately cringe when we hear it used. Events that may be trivial have been labeled as sexual harassment, maybe deliberately in an effort to make feminists look like we have gone too far—not only do we get labeled "antiboys," but also we are described as just downright silly. But, quite frankly, that is not as disturbing as the hijacking of legal victory in the Davis case, which is now being used in the service of student surveillance, punishment, and control amid the law-and-order/school safety discourse that so consumes our nation.

The feminist discourse and thinking that began this work on sexual harassment years ago, and that led to the victory in the Davis case, has been appropriated by the zero tolerance/school safety forces, who have added sexual harassment to a long list of behaviors that school personnel may use to suspend and expel young people from schools. There are no second chances for the students, no discretion for administrators, and no teachable moments for teachers to use with their students. As a former middle school teacher myself who had 36 students in my class (Whittier Middle School, Dayton, Ohio), I used to believe in and use the "teachable moment." But, that technique has been removed from a teacher's repertoire, an act justified under the rubric of zero tolerance.

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Moreover, remembering the context in which the Davis case has landed helps to explain the predicament that we are in: it came one month after the April 1999 shootings at Columbine High School, in Littleton, Colorado. The Davis case was rapidly converted into just another justification for law and order and for zero tolerance policies—do anything to avoid a lawsuit or a school shooting. And we can't forget that this school safety mania/zero tolerance mantra is part of the larger discourse that also includes trying minors as adults (Proposition 21 in California, passed in March 2000), deterrence theories, "three strikes, you're out," mandatory sentencing, drug policy, capital punishment, and a general reduction of civil liberties. And, this feminist victory is being used by people that most feminists may not consider our allies, those who would be

hard-pressed to care about feminist issues. Feminism is being used to establish new forms of control.

In September 1992, along with some colleagues from the Wellesley College Center for Research on Women, I conducted a survey on sexual harassment in schools that ran in Seventeen magazine (LaBlanc, 1992). Among the multiple-choice questions, were also two open-ended questions, one of which asked, "What do you think schools should do about sexual harassment?" One young respondent wrote, " I believe that if all girls who have ever been sexually harassed reported the guys who did it, there would no longer be any boys in school." (personal communication, 1992). At the time, I thought this was true but not likely, since when boys sexually harassed girls, if it was noticed at all by school personnel, it was treated lightly, and only rarely did the harassers get punished.

Flash forward from 1992 to the fall 1996, when the nation focused on an incident in Lexington, N.C. Jonathan Prevette, that cute little six-year-old boy with the curly hair and the thick glasses, kissed a little six-year-old girl. Most of the media attention that this incident generated focused on the injustice of his so-called "suspension" (I always took issue with the use of the word "suspension" in this case, as he was moved from one class to another for the day—not exactly the definition of "suspension" by any stretch of the imagination). The school officials were mocked and criticized for paying attention to the plight and distress of the little girl, yet they were made to look the fool for extending the label of sexual harassment to the behaviors of such young children. But the real culprits were made out to be the feminists who had gone too far—we were blamed for having created this world into which Jonathan was now being demonized (Stein, 1999; O'Toole, 1997).

During the media frenzy over this incident, ABC's Nightline with Ted Koppel devoted a show on October 4, 1996, to this kissing-kid episode. The guests were Verna Williams of the National Women's Law Center in Washington, D.C. (the woman who would later argue the Davis case in the Supreme Court); Peggy Orenstein, a San Francisco area based journalist and author of School Girls; Dr. Alvin Poussaint, child psychiatrist at Harvard Medical School; and Christina Hoff Sommers, author of Who Stole Feminism and a former philosophy professor at Clark University, who resides currently at the American Enterprise Institute, a conservative think-tank in Washington, D.C. For 30 minutes on national television, as these four people discussed the kissing-kid incident, there was no mention of the term "zero tolerance," or even the larger notion of school safety.

Yet, it was around that time that schools were required to institute zero tolerance policies to bolster school safety and ensure orderly learning environments. The Gun Free School Act, passed by Congress in 1994, required states that receive federal funds to mandate expulsion, on a case-by-case basis, for at least one year, of any student who brought a weapon to school (Harvard Ed. Letter, Jan./Feb. 2000). A weapon was defined as "guns, bombs, grenades, missile launchers, and poison gas, it did not include knives...though some states were permitted to use a broader definition of weapons" (Wasser, 2001).

However, these expulsion policies have gone from a prohibition on real hardware—guns—to now including toy weapons and squirt guns, drugs, symbolic representations of drugs (like drawings of marijuana leaves, a case that the Massachusetts chapter of the American Civil Liberties Union is representing), to fighting, gang activity, threats of violence, hate offenses, and sexual harassment (Ed Week, Jan. 26. 2000, p. 7). More and more children are being removed from school, with no place to go; only a few states have requirements to establish alternative schools for these suspended and expelled children. More and more young people are hitting the streets, becoming exiles, being criminalized, if you will. I believe this trend to expel young people is also a manifestation of the decline of our sense of collective responsibility for children and youth.

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In October 1998, The Clinton White House held a conference on school safety, essentially to address the school shootings that had taken place the previous spring in Jonesboro, Arkansas, and Springfield, Oregon. Three factors were promoted at this conference as a way to create school safety: school uniforms, metal detectors, and curfews. Since then, in this post-Columbine world, some schools think that the way to ensure school safety is to remove lockers from hallways, add fencing to the school grounds, require the students to wear identification badges, and permit them to use only see-through backpacks. In addition, students have been suspended retroactively for papers they have written, thoughts they have had, and, in one case, for drawing that marijuana leaf (which could have easily been a tomato plant). This drawing was seen as a violation of the school's zero tolerance drug policy.

Moreover, zero tolerance policies have racial implications—students are being suspended disproportionately by race under these policies. According to U.S. Department of Education figures, in the 1997 school year, black children made up 17 percent of all U.S. students but 32 percent of those suspended, while white students made up 63 percent of all students and 51 percent of those suspended, and Hispanics made up 14 percent of all students and 13.5 percent of those suspended (Shepherd, 2000).

Sexual Harassment and Zero Tolerance

In this era of zero tolerance, students are suspended and expelled for incidents of sexual harassment. My examples of sexual harassment come from a variety of sources: the media, parents who call me, students who e-mail me, and conversations that I have with teachers and administrators. My examples are not scientific, but, as I always say, neither are lawsuits; they are a sample size of one, but they can teach us a lot—they may be signs of where the nation might be headed. These examples may be at the margins of what is happening, but they allow us to think about whether we would want these examples to become the center, the norm, or not.

Here are a few examples of the ways in which behaviors have been framed as expellable sexual harassment or criminal sexual assault since the Davis case:

- An elementary school boy in Washington State sticks out his tongue at a girl and he is suspended for sexual harassment/oral sex. Remember that this was not a teenage boy making gross tongue

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movements toward a teenage girl, but rather, they were small children. Granted, the tongue movements still may be gross and/or inappropriate, but one must remember how often students stick out their tongues over the quality of the food that is served to them in the school cafeteria.

- Five fourth graders in Oswego, New York are suspended for poking their straws through their milk cartons, which had photos of a female cheerleader on them. These boys poked their straws through the section of the milk carton that was her chest area (Education Week, Feb. 23, 2000, p. 4). What I wonder about this is what would have happened to these children if they had poked holes in the part of the milk carton that was her head: Would they have been suspended for being pre-Columbine shooters? Or, if it had been her feet, would they be considered proponents of voodoo instead of sexual harassers? Or of having a foot fetish? Indeed, if the school has rules that playing with one's food is against the school rules, then reprimands against these children certainly would have been warranted. But, to construct this incident as one of sexual harassment seems to be a stretch and an injustice.
- A mother in Colorado who has twin fifth-graders (one boy and one girl) called to tell me that her son had been labeled a sexual predator for "depanting" another boy his same age on the school playground. The school principal did not think that loss of recess privileges along with an apology to the other child was sufficient. I worry about the use of an adult, criminal label for this child, and the ways in which his peers will treat him.
- In West Bath, Maine, a group of third-grade boys used force to hold down a female classmate on the playground while one of them climbed on top of her and pretended to have sexual intercourse with her. The girl, who was frightened and crying, reported the incident to the playground supervisor, who is alleged to have told her to "stay away" from the boys. Two days later, the same incident was repeated and this time the girl told her parents (MacQarrie and Merrill, 2000; Sharp, 2000). Indeed, the school district might be negligent in this incident, and the girl's parents threatened to sue the school district in federal court for sex discrimination/sexual harassment (federal law Title IX), and failure to protect their daughter on the school playground. If the girl had indeed told a school official, who failed to take any action, the school district may be found liable.

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However, particularly troubling was the way this incident, as reported by the press, escalated to discussions of criminal prosecution of the boys for sexual assault. Yet, it turned out that under Maine law, nine-year-olds cannot be prosecuted for adult crimes (state juvenile facilities only take children from age eleven and up) (Merrill, 2000). Indeed, school-based consequences for the boys' behavior are warranted, but to attempt to move this incident into the criminal justice system seemed to be an extreme measure, yet made fashionable by the standards imposed by zero tolerance. Moreover, when the boys, who were suspended for a few days, returned to school, the girl who had been the target was the brunt of teasing and other hostile behaviors from her peers (Merrill, 2000). Once again, this school proved itself to be remiss; they seemed no better prepared to deal with the aftermath of the episode than they did to intervene or prevent the egregious behaviors in the first place. They did, however, send a letter home to all the parents, hired an extra playground supervisor, sent several teachers to a conference on bullying and harassment, and spoke to the students about "civility, bullying and harassment" (Sharp, 2000). Too bad they didn't frame the incident as one of "violence" (or even "sexual violence"), which might have conveyed to the children the seriousness of the boys' conduct toward the girl. It is ironic in this era of zero tolerance and the mania to name so many behaviors as violent that this one was not so named.

- An e-mail from a teenage boy appealed for help after he had been accused of sexual harassment. The point of this story is that here is a student, reaching out for understanding, for an explanation that no doubt his school has not provided to him.

> Hello. My name is Stuart XXX. I am a 17-year-old, and a senior in high school. I found out today that I was being accused of sexual harassment. I was amazed and taken by surprise because I had no idea that what I had done was considered as sexual harassment. This was possibly because my school had not properly educated its student body on the facts of sexual harassment or because I am an ignorant person. About a month ago I commented on a fellow student's figure in a positive manner. That person gave little response so I continued the compliments for about three other times to still receive no response. Agitated with this reaction, I soon disliked this person. I began to annoy [her] every so often. Please keep in mind this is over a period of a month

> or so. Maybe twice a week. I would ask stupid questions of whether this person hated me or not. I would sometimes poke her arm with my index finger in a way that would render no danger physically. I may once in a while walk by [her] desk and graze [her] arm. Once I made a remark as to if [she] did not respond to a question, that meant [she] wanted to go on a date and become more than friends. All of this was in jest. However, due to the fact that [she] barely ever gave any response, I had no idea of the effects of my agitations. So, today I find out that it is sexual harassment. I did some research on the net and found one common recurrence. It was stated that sexual harassment had an obvious and profound effect on the work performance of the victim. So profound that tasks were beginning to become very difficult. I took this as a student's learning environment becoming drastically affected so that they were unable to learn. I feel that my remarks by no means affected this person in such a way.... Do you have any suggestions or an answer to whether I am guilty or not? I have a conference Monday morning on the matter, so if there is any way you could reply, it would be most graciously accepted. Thank you for your time. (January 2000, personal communication).

- Likewise, teachers report to me how they are being designated, quite out of the blue, by administrators, to be the "sexual harassment grievance coordinator" for the school without receiving any preparation besides reading some memos from the administrator's file. A third-grade teacher in Massachusetts told me how she was supposed to provide training for the rest of the staff and how she was clueless and worried. Administrators seem to be appointing teachers without giving them any guidance or opportunities to get training for themselves, just ordering them to do so (personal communication, January 2000).

Zero Tolerance and Feminism

Now, to return to my larger point and concern that zero tolerance policies are antithetical to feminism. They represent an individualistic approach; there is no collective piece to them at all, and they exclude rather than try to reshape or reform the individual. And, there is no collective responsibility for the excluded person, no space for this person.

In addition, these zero tolerance policies, besides sacrificing the individual in the name of creating the supposed safe middle, also seem to be in contradiction to the whole notion of education, which is usually about trying to help children learn and improve, whether it is their reading, their grades, their curiosity, or their goals. Generally, schools don't abandon kids when they have trouble reading or writing (or at least school administrators don't publicly admit to that approach and brag about it); there are efforts to accommodate to the students' various learning styles and rates.

Strategies for Zero Indifference (Instead of Zero Tolerance) for Sexual Harassment

To achieve a gender-safe school, I think we need to employ several simultaneous strategies to ensure that sexual harassment won't have a presence there. I suggest that we call this "zero indifference," rather than "zero tolerance," which would mean that we plan to notice the behaviors, comment on them, intervene, and make corrections accordingly.

1. Institute classroom education and curriculum that are long-term, engaging, fun (not lectures by the school board attorney), and age-appropriate. The more this subject of sexual harassment—and I like to also connect it to "gender or sexual violence"—can be integrated into the whole curriculum and to the main texts that the students are using, the better. That way it isn't a burden to the teachers, because it is an integral part of the curriculum, and it makes more sense to the students since it is included as an integral part of the curriculum and not added on as an afterthought.
2. Train all the staff, including the administrators, custodians, school secretaries, bus drivers, coaches, teachers, guidance counselors, playground and lunchroom supervisors, and psychologists. This training should last longer than a casual staff meeting or the early-release-day faculty inservice that lasts two-and-a-half hours. How about a full day? Or repeated sessions throughout the year?
3. Designate at least one man and one woman in every building as the "omsbuds" (I'm adverse to calling them the "sexual harassment grievance coordinators" or "complaint managers"—what students are going to visit school officials with those titles?) to whom students can go with inquires or concerns and who will act on their behalf. These individuals will need extra training, and possibly release time (from their current course schedule) to serve in this capacity. The placement of their offices is also a matter

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for serious consideration, and their locations as well as their names should be publicized throughout the school community.

4. Develop school-based codes of discipline for sexual harassment that ensure due process rights for the accused, as well as assurances that the student who makes the complaint will be protected from the harasser and his/her friends who might consider retaliation.
5. Develop school-based restraining orders/stay-away orders that would function to protect the student(s) who have made a complaint of harassment against another student(s). Class schedules, walking routes, bus assignments, lunchtime and other informal locations would be covered under these restraining orders.
6. Create multiple strategies for resolution, which may involve face-to-face meetings between the harasser and the target, as long as they are voluntary and adults are present in the room (it is not up to the students to solve this problem of sexual harassment). No forced mediation, conducted only by student mediators, should be allowed. These voluntary efforts, which may also include the technique "write a letter to the harasser," cannot take the place of punishment, especially if the incident involved physical contact (as happened to LaShonda Davis) and/or if it was a repeated event.
7. Offer compassionate responses to the harasser in the form of counseling, whether as individual counseling or in a group setting. I am working with Brookline High School in the Boston area through a National Institute of Justice/COPS grant that they received, offering many groups, to both boys and girls—the boys are those who have harassed girls, and the girls join typically because they want to talk about the abusive relationships that they repeatedly enter into. Other schools offer such counseling groups, sometimes run by staff from the local domestic violence or sexual assault center. I have been inspired by the one in Austin, Texas—SafePlace—which has been running groups in the Austin schools for nearly 12 years, reaching hundreds of young people a year in their 24-week sessions.
8. Parents need to be involved—both through open community forums as well as in private discussions, especially if their children are involved in incidents of sexual harassment. One technique that I have seen used is providing the classroom lessons to the parents, having them do the assignments on

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sexual harassment and also having them view the students' work. It can be very enlightening for them.

9. Administer sexual harassment surveys that include questions that inquire about the relationship between the harasser and the target—such as, were they in a dating relationship? Did one person want to date the other, who wasn't interested? Is this harassment due to a romance (mutual or otherwise) that went sour?
10. Incorporate subjects such as dating violence and student-to-student sexual harassment into college teacher-preparation courses as well as recertification courses.

Conclusion

Above all, sexual harassment must be framed as a matter of creating a safe school environment and infusing a concern for social justice and democracy into the schools. Sexual harassment violates fundamental democratic principles, and the problem ought to be discussed in a way that highlights those principles. If schools are to be agents of democracy, helping to create citizens ready to participate in the democracy, we need to practice democracy in our schools. Which would mean at the outset that we must alter this current trend of zero tolerance, which seems antithetical to democracy. In addition, it means putting at the forefront conversations and lessons about social justice, including sexual harassment, and finding mechanisms for justice that are worthy of a democratic institution in a democratic society (Stein, 1999, p. 94).

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The Legal Implications of Administrative Leadership in the Implementation of Technology Policy

by

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I. Introduction

In response to national and state reform movements, and in an attempt to strengthen preparation standards for teachers and students, accreditation boards have prepared performance indicators in the area of technology. Such standards call for the full integration of technology in school curricula, formal coursework and professional development workshops for teachers, and an understanding on the part of teachers and students alike as to the legal and ethical issues surrounding the use of technology. The activity follows the usual policy-making paradigm in American education. The legislature, at both national and state levels, establishes the law and sets policy. State boards of education prepare guidelines and specifications for the implementation of policy. In the area of technology, information is provided by commercial organizations such as the International Society for Technology in Education (ISTE) which has created the National Educational Technology Standards (NETS) as educational technology foundations for teachers, and more recently, the Technology Standards for School Administrators (TSSA). Administrators, at all levels, are expected to comply with the governmental directives (based on the commercial influence) and implement these policies. Finally, researchers in colleges and universities review and evaluate the success of the policies and report these back to the policy makers. According to ISTE and other guidelines, administrators, particularly school building principals, will be held accountable for, among other things: 1) creating and implementing a technology curricula; 2) ensuring that technology skills will be made available to students and teachers; 3) communicating to parents the opportunities available to students in this area; 4) creating a teacher evaluation instrument that assesses teacher proficiency in integrating technology into the curriculum and 5) serving as the chief recruiter in attracting teachers with technological skills. Failing to meet these responsibilities could subject administrative personnel to charges of incompetency and other reasons for discharge, nonrenewal of contract, or suspension. Such professional sanctions could be minimized if administrators are considered to be part of the entire policy-making process of technology implementation examining the strengths and weaknesses of rules and guidelines at every decision-making level.

I. The Drive Toward Technology

The drive toward technology in the schools is a recent, but by no means new, phenomenon.

The National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform 1 (Government Printing Office 1983).

> The report altered the way the United States viewed education. The report declared that if "an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war." *A Nation at Risk* served as an impetus for nationwide public school reform. Among several other recommendations, the Commission advised educators to ensure that all high school graduates understand how to use a computer. The Commission also recommended that educators teach students how

> to use technology to study other school subjects and for "personal and work-related purposes." The Commission believed that an understanding of technology was an essential component of an education that would "prepare [America's] children for far more effective lives in a far stronger America."

The support of technology in the public schools is supported in significant ways first by the Clinton administration, and then, by the Bush administration.

U.S. Department of Education, Office of Educational Technology, *e-Learning: Putting a world-class education at the fingertips of all children* (visited March 10, 2001) <http://www.ed.gov/Technology/elearning/index.html>

> The Clinton-Gore administration articulated a federal policy listing technology as a fundamental component of an effective public education system. In 1996, U.S. Secretary of Education Richard Riley released the nation's first plan to integrate technology into the public education system. The plan, entitled *Getting America's Students Ready for the 21st Century: Meeting the Technology Literacy Challenge*, sought to present "a far-reaching vision for the effective use of technology in elementary and secondary education to help the next generation of school children to be better educated and better prepared for the evolving demands of the new American economy." From 1995-2000, the Clinton-Gore administration allocated over eight billion dollars to the states to purchase technological equipment for schools and to fund educational technology programs. Recently the U.S. Department of Education believed they needed to update their educational technology initiative and released the *National Educational Technology Plan* in December 2000. This plan provided the nation with five educational technology goals:
>
> Goal 1: All students and teachers will have access to information technology in their classrooms, schools, communities and homes.
>
> Goal 2: All teachers will use technology effectively to help students achieve high academic standards.
>
> Goal 3: All students will have technology and information literacy skills.
>
> Goal 4: Research and evaluation will improve the next generation of technology applications for teaching and learning.
>
> Goal 5: Digital content and networked applications will transform teaching and learning
>
> At the end of the report, the Department of Education made a bold statement, perhaps directed at the forthcoming Bush-Cheney administration. They state, "The use of technology in education must remain a national priority. It must be at the core of the educational experience, not at the periphery. Now is the time to

renew our commitment to the future by challenging the nation to take bold action in hastening the coming of the future of education."

U.S. Department of Education: Office of Educational Technology, *No Child Left Behind: Enhancing education through technology* (visited March 10, 2001) <http://www.ed.gov/inits/nclb/partx.html>

In January 2001 the Bush-Cheney administration unveiled an initiative entitled *No Child Left Behind: Enhancing Education through Technology*. They insist that their administration "believes schools should use technology as a tool to improve academic achievement." They plan to streamline "duplicative technology programs into a performance-based technology grant program that sends more money to schools."

Lowell Rose and Alex Gallup, *The 32nd Annual Phi Delta Kappa/Gallup Poll Of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 2000, at 54-55.

The 2000 Phi Delta Kappa/Gallup Poll reveals that the majority of taxpayers believe technology is an important part of public education. The poll claims that 82% of adults polled believed that public schools should "invest more in computer technology for instructional purposes."

The National emphasis on Technology in schools has been translated into teacher and administrator performance standards as articulated by commercial organizations

ISTE (International Society for Technology in Education) National Educational Technology Standards (NETS) and Performance Indicators (for teachers), <http:CNETS.ISTE.ORG>

1. Teachers demonstrate sound understanding of technology operations and concepts.
2. Teachers Plan and design effective learning environments and experiences supported by technology.
3. Teachers implement curriculum plans, that include methods and strategies for applying technology to maximum student learning.
4. Teachers apply technology to facilitate a variety of effective assessment and evaluation strategies.
5. Teachers use technology to enhance their productivity and professional practice.
6. Teachers understand the social, ethical, legal, and human issues surrounding the use of technology in PreK-12 schools and apply those principles in practice.

Collaborative for Technology Standards for School Administrators (TSSA Collaborative)

The Collaborative for Technology Standards for School Administrators, *Technology Standards for School Administrators*, <http://www.cnets.iste.org/tssa/framework.htm>

Members of the TSSA Collaborative include: National Association of Elementary School Principals, National Association of Secondary School Principals, National School Board Association, International Society of Technology in Education, consortium for School Networking, North Central Regional Technology, North Central Regional Education Laboratory, and Southern Regional Educational Board. The TSSA Collaborative is funded by the U.S. Department of Education's "Preparing Tomorrow's Teachers to Use Technology" (PT3) Program and from TSSA contributors.

The TSSA Collaborative seeks to define standards that "identify a common focus for the role of leadership in enhancing learning and school operations through the use of technology" and address "leadership for technology with the ultimate purpose of preparing students for their futures." Although these standards are in their preliminary stage, the TSSA Collaborative represents a valiant effort to "represent a national consensus among educational stakeholders of what best indicates effective school leadership for comprehensive and effective use of technology in schools."

At this point the TSSA Collaborative has created six domains in draft form:

1 .Leadership and Vision, Educational leaders inspire the development of a shared vision for comprehensive integration of technology and foster an environment and culture conducive to the realization of that vision.
2.Learning and Teaching, Educational leaders ensure that curricular design, instructional strategies, and learning environments to integrate appropriate technologies to maximize learning and teaching.
3.Productivity and Professional Practice, Educational leaders apply technology to enhance their professional practice and to increase their own productivity and that of others.
4.Support, Management, and Operations, Educational leaders provide direction to integrate technology tools into productive learning and administrative systems.
5.Assessment and Evaluation, Educational leaders use technology to facilitate a comprehensive system of effective assessment and evaluation.
6.Social, Legal, and Ethical Issues, Educational leaders understand the social, legal, and ethical issues related to technology and apply that understanding in practice.

An underlying theme of the above domains is that administrators must be highly trained in instructional technology and be prepared to help teachers effectively integrate technology into instruction. As the TSSA Collaborative rightly points out, *Administrators should be competent users of information and technology tools that are common to information-age professionals. That is, they must be 'doers' with technology.*

II. State Initiatives

This cascade of federally sponsored educational reform has been quickly absorbed by state governments and almost all have implemented programs in school technology for K-12 education. Four general trends have emerged from the statues. The first statutory trend is not surprising; every state except Alaska has enacted legislation that enables public schools to gain access to technology.

1. Public Schools and Access to Technology

Ala. Code 1975 § 16-61D-4 (2000).

The Alabama Legislature seeks to "establish standards and coordinate services and infrastructure…[to provide] the children of Alabama citizens access to technology in the public schools."

29 Del. Code § 6102A (2000)

Created the Delaware Technology Account to "provide computer and telecommunications equipment to Delaware's classrooms."

Ark. Code Ann. 6-16-401 (Michie 2000)

The Arkansas Legislature states "its intent and commitment to use every means available to obtain and utilize to the fullest extent computer technology in the instructional process in the public schools of this state."

D.C. Code Ann. § 31-2521 (Matthew Bender 2000)

Provides for the 21st Century Public School Information Technology Program. The program "grants [funds] to all teachers [to] purchase personal computer equipment, program, or updates."

2. Creation of a state educational technology commission.

S.D. Codified Laws § 13-3-59 (2000)
South Dakota established an Office of Educational Technology in the state Department of Education whose responsibilities include "researching, analyzing, procuring, and distributing programs and methods using educational technology in South Dakota K-12 schools and classrooms.

14 Del. Code § 4201 (2000).

The State of Delaware created a center called the Delaware Center for Educational Technology so as to "concentrate on the deployment of technology at the school level in a way that will be of maximum effect in improving teaching and learning in Delaware schools."

105 Ill. Comp. Stat. Ann. 5/2-3.62 (Matthew Bender & Co., Inc. 2000)

"A regional network of educational service centers shall be established by the State Board of Education…Services to be made available by such centers shall include the planning, implementation and evaluation of…computer technology education including the evaluation, use and application of state-of-the-art technology in computer software."

Ohio Rev. Code Ann. 3301.80 (Anderson 2000)

The Ohio Legislature created the Ohio SchoolNet commission that will "administer programs to provide financial and other assistance to school districts and other educational institutions for the acquisition and utilization of educational technology."

Cal. Ed. Code § 51871.3 (Matthew Bender & Co., Inc. 2001)

"The Commission on Technology in Learning is hereby established to make policy recommendations to the State Board of Education in areas including, but not necessarily limited to…statewide planning for technology, including a statewide master plan for use of education technology in California's elementary and secondary instructional program.

Idaho Code § 33-4805 (Matthew Bender & Co., Inc. 2000)

The Idaho Educational Technology Council shall "develop and maintain a statewide education technology plan to provide seamless education in Idaho…

3. Professional Development Programs.

N.J. Stat. § 18A:6-105 (Matthew Bender & Co., Inc. 2000)

"The Commissioner of Education shall develop and administer an Educational Technology Teacher Training Program. The purpose of the program shall be to provide grants to local school districts which have successfully integrated technology within their own educational programs to develop and offer educational technology training programs to the teachers and staff of other school districts and to the teachers and staff of non-public schools."

24 Penn. Stat. § 151503A (2000)

"Grants shall be allocated to school districts… [to] provide for the training of teachers and staff in ways to effectively integrate the technology with the curriculum."

Va. Code Ann. § 22.1-253.13:5 (Matthew Bender & Co., Inc. 2000).

Each local school district must provide "a program of professional development in educational technology for all instructional personnel which is designed to facilitate integration of computer skills and related technology into the curricula."

N.Y. Educ. Law § 316 (McKinney 2000)

Public school districts are to create resource and training centers in order to "provide demonstration and training sites where teachers are trained, specifically in the use of computers as teaching aids; the criteria for school acquisition and use of computer equipment and software; and the evaluation of computer-related materials."

Va. Code Ann. § 22.1-253/13/5 (Matthew Bender 2000)

"Each local school board shall provide ... a program of professional development in educational technology for all instructional personnel which is designed to facilitate integration of computer skills and related technology in curricula."

4. Teacher certification or licensure.

Colo. Rev. Stat. Ann. § 22-2-109 (West 2000)

The Colorado Legislature adopted teacher licensure standards as of July 1, 2000 requiring prospective teachers to demonstrate the ability to "integrate technology into instruction at the grade level of which the teacher expects to be endorsed" before receiving a teaching license.

Cal. Ed. Code § 44259 (Matthew Bender 2000)

Beginning January 1, 2000 all teachers seeking licensure must demonstrate "competency in the use of computers ... and effectiveness, of advanced computer-based technology, including the uses of technology in educational settings."

Ga. Code Ann. § 20-2-201 (West 2000)

"Universities and colleges having teacher preparation program ... shall require students in such programs to be proficient in computer and other instructional technology applications and skills including understanding desktop computers, their applications, integration with teaching and curriculum, and their utilization for individualized instruction with classroom management. ... Before granting a renewable certificate to an applicant, [students are required] to demonstrate satisfactory proficiency on ...a test of computer skill competency."

Conn. Gen. Stat. Ann. § 10-145a (West 2000).

As of July 1, 1998, requires teachers who wish to be certified to complete "a computer and other information technology skills component…as applied to student learning and classroom instruction, communications, and data management."

Ohio Rev. Code Ann. § 3319.235 (Baldwin 2000)

Requires institutions of higher education that train teachers to "ensure that graduates of such course of study are skilled at integrating educational technology in the instruction of children."

An Important Shortcoming of State Statutes: Only six states refer to the term "administrator"

Nev. Rev. Stat. Ann. § 388.790 (Matthew Bender Co., Inc. 2000)

The commission on educational technology, consisting of 11 members is hereby created. The superintendent of public instruction and the director of the department of information technology shall serve ex officio as nonvoting members of the commission. The governor shall appoint the following voting members to the commission, at least two of whom must reside in a county whose population is less than 100,000…One administrator in a public school who possesses knowledge and experience in the general application of technology.

Cal. Ed. Code § 51871.4 (Matthew Bender & Co., Inc. 2001)

"The Commission on Technology in Learning shall consist of 14 members who shall be appointed as followed…The Governor shall appoint one practicing public school administrator from an organization presenting California administrators."

Rev. Code Wash. § 28A.650.015 (Matthew Bender & Co. Inc., 2001)

"The superintendent of public instruction shall appoint an educational technology advisory committee to assist in the development and implementation of the technology plan in subsection (1) of this section. The committee shall include, but is not limited to, persons representing: The state board of education, the commission on student learning, the department of information services, educational service districts, school directors, school administrators, school principals, teachers, classified staff, higher education faculty, parents, students, business, labor, scientists and mathematicians, the higher education coordinating board, the work force training and education coordinating board, and the state library."

Conn. Gen. Stat. §10-4e (1999)

"The State Board of Education and the Board of Governors of Higher Education, with the advice and assistance of the State Library Board, the New England Cable Television Association, the Connecticut Broadcasters Association, the Southern New England Telecommunications Corporation and Connecticut Public Broadcasting, shall form a joint committee to assist both agencies to coordinate effectively and utilize efficiently educational technology for Connecticut students. The committee shall consist of at least the following…one member appointed by the Connecticut Association of Public School Superintendents.

LA. R.S. §17:3921.2 (2000)

"A 'State Technology Advisory Committee' shall be jointly formed by the governor and state superintendent of education for the purpose of recommending to the State Board of Elementary and Secondary Education, hereinafter referred to in this Section as the "board", appropriate procedures and guidelines for awarding technology grants as provided in this Section…The committee will be comprised of at least the following members… one school superintendent…one principal.

Idaho Code § 33-4804 (Matthew Bender & Co., Inc. 2000)

"There is hereby created and established the state council for technology in learning under the state board of education…The council shall consist of fourteen members who shall be appointed as follows: The superintendent of public instruction, or his designee. The superintendent of public instruction shall appoint one practicing public school administrator as a member."

III. Accountability and Reconstitution

Edgewood Independent Sch. Dist. v. Meno, 893 S.W. 2d 450 (Tex. 1995).

The "accountability" movement sets achievement goals, typically for a state system of public education, usually based on student performance on standardized tests, and ties success or failure to administrator retention, demotion, or discharge.

Kelly Rozmus, Education Reform and Educational Quality: Is Reconstitution the Answer?, 1998 B.Y.U. Educ. & L.J. 103-104. (1998).

"Reconstitution" is similar in its emphasis in that it "permits authorized [education] official[s] to completely overhaul underachieving schools by terminating all administrators ... out of that particular district."

70 Okl. St. Ann.§ 1210.541 (West 2001)

The State Board of Education shall engage in the following activities until a school site or district is no longer declared to be low-performing or high challenge: reassignment of district personnel; transfer of students; operation of the school by personnel employed by the State Department of Education; and mandatory annexation of all or part of the local school district..

Ala Code 1975 § 16-6B-3 z(2001): Education Accountability Plan

If, after the implementation of the school improvement plan, student achievement has not sufficiently improved, relative to the previous year's performance, the State Board of Education shall require the State Superintendent of Education to intervene and assume the direct management and day-to-day operation of the local board of education for such period of time as may be necessary for student achievement to improve. In considering intervention, the State Board of Education shall consider the reassignment or removal of school administrators.

105 ILCS 5/2-3.25f (2001): State Intervention

The State Board of Education may authorize the State Superintendent of Education to (a) nonrecognize the school district or school, or (b) direct the reassignment of pupils and administrative staff.

Ken. Rev. Code (KRS) § 158.6455 (2001): ...School Accountability Index.

Schools failing to improve as identified by the board shall be reviewed by a scholastic audit team appointed by the state board under subsection (4) of this section. The audit shall include a formal evaluation of each certified staff member.

Texas v. United States, 523 U.S. 296 (1998)

State law may hold local school districts accountable for student achievement. Failure of achievement may result in imposition of accreditation sanctions including the closing of schools, the de-licensure of administrators and teachers, and the firing of administrators.

City Assoc. of Supervisors and Administrators v. State Operated School District of the City of Newark, 709 A.2d 1328 (Superior Court N.J. 1998).

The State District properly contends, and we agree, that the Act, N.J.S.A. 18A:7A-2, grants State-operated school districts strong powers to modify and amend the practices of previously ineffective or failed local school administrators. This interpretation is wholly consistent with the Act's legislative findings and declarations.

Marlborough School Committee v. Morley, 1996 WL 1196877 (Mass.Super.)

A principal failed to take into account the best interests of students relative to performance standards (including those involving technology) and this was appropriate good cause for his termination.

Hoke County Board of Education v. State of North Carolina, 2000 WL 1639686 (N.C.Super)

A North Carolina statute, N.C.G.S. § 115C-325 (West 2000) has modified law involving the receipt of a sound basic education, including the receipt of instruction in technology. In a recent decision, a state appeals court interpreted the law to mean that a school board could dismiss a principal in a low performing school with minimal due process.

Donato v. Planiview-Old Bethpage Central School District, 96 F.3d 623 (2d Cir. 1996)

The United States Court of Appeals for the Second Circuit indicated that administrators may be terminated for failing to uphold their supervisors' expectations in regards to curriculum and instruction. In this case an assistant principal, was terminated for reasons including "failure to provide adequate instructional supervision."

IV. Administrator Inclusion

Collaborative for Technology Standards for School Administrators (TSSA Collaborative)
The Collaborative for Technology Standards for School Administrators, *Technology Standards for School Administrators,* <http://www.cnets.iste.org/tssa/framework.htm>

The TSSA Collaboration neither lists nor proposes a role for any sort of policy participation for school administrators beyond assessment at the local level. Participation by administrators is limited to the exploration of basic computer applications such as word processing, spreadsheets, email, and exploration into the Internet. Hence, the said role is limited to compliance or the implementation of policy.

Lisa Washington and Lisa Heaton, Developing Technology Training for Principals, Annual Meeting of the American Educational Research Association, (Montreal, Quebec, Canada, April 19-23, 1999), ERIC: ED 429 588.

Administrators' Preferred Participation in Technology: 1) 68% ranked personal use of computers as their most important function in technology; 2) 28% ranked a preferred function as "becoming a technology leader"; 3) 14% ranked "becoming aware of policy issues as important; and 4) lowest mean - participating in the development of the school's Internet Acceptable Use Policy.

Recommendations

1. Educators should exercise leadership, not only in implementing policy [i.e., complying or carrying at prescribed directives], but also in evaluating and promoting policy.
2. The inclusion of administrators would bring very important perspectives to the review and evaluation of policy. Precisely because they are involved in the educational enterprise, educators throughout the system are in a special position to grasp the strengths and shortcomings of new policies and guidelines.
3. The involvement of educators, especially those in administration, in policy formation and analysis, would tend to bring them into greater ownership of responsibility, thus ensuring that the policies were so shaped as to improve their chances of implementation.
4. A seventh domain be added to the TSSA framework: educational leaders must take an active role in the creation, implementation, and modification of local and state policy relating to technology in public education. For administrators to meet this standard, government leaders must allow them to take a role in the creation and modification of policy.

LEGAL THREATS TO SCHOOL ACCOUNTABILITY SYSTEMS

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Legal Threats to School Accountability Systems

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Abstract

The rapid proliferation of school accountability systems and the increasing stakes being attached to them will no doubt begin to be challenged in the courts. This paper extrapolates from existing case law on testing to the likely ways in which school accountability systems may also be challenged in the courts. The same categories of suits filed against specific tests and test uses -- due process claims and equal protection claims -- may well apply to accountability systems. Due process considerations include adequate notice to schools about the requirements they face, appeals processes, and a non-arbitrary system. Equal protection considerations include whether schools with large percentages of minority students are rewarded or sanctioned in proportion to other schools. A list of recommended actions for accountability system developers is also offered.

Legal Issues in School Accountability Systems

School accountability has become the centerpiece of educational reform efforts in the United States. Just days after taking office, for example, U.S. President George W. Bush made his plan for education reform, No Child Left Behind, available on the White House website (Bush, 2001). One of the key components of the reform plan is the annual assessment of reading and math in every state for grades 3 - 8 and "a system of sanctions and rewards" (Bush, 2001, p. 3) in all states. The results are then used to dole out monetary incentives or sanctions to whole states as well as individual schools. Though this proposal brings school accountability front and center of the national domestic agenda (it was the first piece of legislation in both the House of Representatives and the Senate in the 107th Congress), it represents what has been a growing movement for some years. In a 1998 study, more states reported using tests for school-level accountability purposes than for purposes with direct impact on students (Bond, Roeber, & Connealy, 1998).

Not only are the numbers of accountability systems increasing, but also the stakes attached to them are rising. That is, the rewards or penalties associated with these systems are becoming more tangible and salient to school districts and individual schools. In the 1999-2000 school year, only five states employed a "public reporting" accountability system without tangible rewards or sanctions, and of those, three are planning to change that as early as 2001-2002 (Goertz, Duffy & La Floch, 2001). As of March, 2001, five states have provision to give a low performing school a written warning, and fifteen states have provisions to take over a low-performing school (Ziebarth, 2001). And the rewards and sanctions may not stop at the school level. Systems for holding teachers accountable through performance-based pay and other forms of evaluation as well as systems for holding students accountable through performance-based retention/promotion and graduation are also in various stages of development (Weiss, 2000). According to the Quality Counts 2001 report (2001), eleven states allow teachers to receive monetary bonuses in high-performing schools while 16 states have the option to replace individual principals or teachers for low performance. Alabama and North Carolina have actually replaced personnel at schools with low performance; Texas links teacher evaluations to test scores and Delaware and Georgia plan to do so (Quality Counts 2001, 2001). The stakes for students are rising as well. Currently three states link student promotion to test scores and four other states plan to do so by 2003 (Quality Counts 2001, 2001). As these stakes continue to rise for states, school districts, schools, and even teachers and students, the likelihood that these systems will be challenged in the courts also increases.

The goal of this paper is to extrapolate from the legal challenges that educational tests have faced to the possible challenges school accountability systems may face and to offer recommendations to the developers of these systems based on the legal issues. Three main conditions have been set in developing this analysis. First, since our review of case law revealed no actual challenges to accountability systems on the grounds discussed here, this review is necessarily speculative. We assume that the same legal challenges that have been made to specific tests and testing programs can generalize to a larger accountability system. There is some justification for making this generalization. A report from the U.S. Department of Education's Office of Civil Rights (OCR) suggests just such a generalization: " while this guide focuses on the use of tests, similar principles apply to the overall decision-making process used to make high-stakes decisions for students" (OCR, 2000, p. vi). The Standards for Educational and

Psychological Testing address "testing practices and the effects of test use" (AERA, APA, & NCME, 1999, p. 2), implying that the standards, too, are relevant to accountability systems insofar as they constitute a test use. It seems reasonable, therefore, to extrapolate the case law and other precedence from a testing program itself to accountability systems that employ test results.

Second, individual student accountability, particularly graduation tests, has received considerable legal attention (cf. Madaus, 1983 and Phillips, 2000a) and thus will not be addressed here. Neither will we address issues involving students with disabilities or Limited English Proficient students. Substantial case law exists for both subgroups of students, but it is most relevant to student, rather than school, accountability. Those cases are germane to systems that would use testing to promote students in grades or to grant a diploma, for example. They do not have the same relevance for school accountability and have been excluded from this discussion. There is at least one case involving individual students in school accountability testing (Triplett v. Livingston County Board of Education, 1997) wherein the court ruled that requiring students to take the test did not violate their right to their own religious beliefs. Nonetheless, this review does not extend to those areas.

The third condition of our review is that we look only at the precedence in educational testing and not from other areas which may be applicable to school accountability systems. For example, there have been court cases in school financing such as Miami Independent School District v. Moses (1999) where the court clarified that exemption from regulation as a reward to an exemplary school did not extend to school financing regulations in Texas. Such cases could have implications for accountability systems employing monetary rewards or sanctions, but we choose not to address them here. Other rewards or sanctions might also be challenged, for example, the state take-over of a school may raise issues of local control of schools and voters' rights (Doty, 2000). We will, however, confine ourselves to issues arising from legal precedence involving educational testing.

In summary, school accountability systems are continuing to proliferate; and the stakes attached to the systems are becoming higher. This may result in legal challenges to those systems. From the perspective of case law about educational testing, in what ways are school accountability systems most vulnerable? The potential bases for legal challenges to accountability systems can be categorized under two broad headings: due process challenges and equal protection challenges.

Due Process Challenges

The underlying spirit of due process asserts that an individual must have sufficient ability to alter the outcomes of a governmental process to her or his benefit. That is, it establishes control of the outcome in the individual's hands. Should an accountability system remove that individual's control of her or his own destiny in any way, it might be subject to a due process challenge. Due process is the constitutional phrase used to express the idea of fundamental fairness. It is found in both the Fifth and Fourteenth Amendments to the U. S. Constitution expressing that neither the federal government (5th Amendment) nor state governments (14th Amendment) can deprive a person of "life, liberty, or property, without due process of law" (U.S. Constitution, amend. V and amend. XIV § 1). Though the precedence is far from unanimous, the courts have considered education at times both a property right and a liberty interest (see Elul (1999) and O'Neill (2001) for complete discussions). For example, the U.S. Supreme Court stated in Goss v. Lopez (1975) that a public education is: ". . . a property interest which is protected by the Due Process Clause . . .". The varied case law notwithstanding, it seems prudent to accord due process to any governmental procedure that might affect a citizen's right to an education. Due process has been separated into two fundamental aspects: procedural due process and substantive due process.

Procedural Due Process. As the name implies, procedural due process requires fairness in procedural matters. In the testing case law, this is manifested in two fundamental ways: adequate notice (OCR, 2000) to examinees and the ability of examinees to appeal the outcome of a testing process. Adequate notice involves both the clarity of the information people receive about pending consequences and how much time passes between the notice and the implementation of new requirements. There also needs to be a way for consequences or outcomes to be appealed.

Accountability systems are at least in part politically motivated and therefore often have timelines for rewards or sanctions that may not provide enough time for schools to respond adequately (Dorn, 1998). As Kahl (2000) expresses it: "The notion that educational reform is a long-term commitment that requires five to ten years to significantly raise achievement levels is incompatible with the term limits of political figures" (p. 20). In 1999, the average number of years before states could act on low-performing schools was 2.2 years with a minimum of no time and a maximum of 7 years (Quality Counts '99, 1999). The two most common minimum wait times were zero and one year with five states each. Dorn (1998) points out the paradox of such cycles: even a year, for example, is too much time to let an ineffective teacher remain unaddressed while it is not enough time to change educational systems.

Not only are sanctions and rewards coming, perhaps, too rapidly, but also the criteria used for determining high-and low-performing schools may be moving targets. Between 1995 and 1999, one state had changed its assessment system 3 times, 16 states had changed systems twice, 26 states had changed systems once, while only 3 states maintained the same system (Stevens, Estrada & Parkes, 2000). This not only effectively shortens the time span schools have to respond but also changes the goals schools are expected to meet.

From the legal perspective of procedural due process, such short periods imposed on schools probably do not provide them with appropriate time to respond, which could be grounds for a lack of adequate notice suit. So how much notice is enough? The courts have been quite case-specific on this point (OCR, 2000). Mehrens and Popham (1992) highlight how fine this edge might be with their examples of one court ruling that 13 months was insufficient notice for a high school diploma exam while another court ruled that 24 months was adequate notice (p. 268). Coleman (1998) points out that adequate notice is a function of the purpose of the test and its use. Therefore, generalizable time requirements are not possible. In the case of school accountability systems, there is no clear guidance about appropriate time lines for schools or districts. Making the curricular, administrative and staffing changes necessary to increase student performance system-wide should be given more time than individual students are given to achieve graduation requirements since systemic change is harder to effect. Given the high standards of accountability often desired, it may often be wholly unreasonable for schools to achieve them in two or three years. One strategy that might ameliorate the time pressure and provide adequate notice to schools is gradually to phase in rewards and sanctions. Virginia, for example, has a measured implementation schedule where full sanctions and rewards will not be operational until 2006 (Application of the standards, 2000).

The second aspect to procedural due process is appropriate opportunity for individuals to appeal any decision. If accountability systems do not provide the opportunity for schools or individuals to appeal their ratings, they could be violating procedural due process. For example, though Florida legislation authorizes the withholding of funds from low performing schools, it does not explicitly specify an appeals procedure (Functions of state education agencies: Commissioner of Education, 2000). The Alaska statutes, on the other hand, provide a clear appeals provision even though they do not provide any specific sanctions. That statute reads in part: "The state board shall adopt regulations to allow a district to appeal the performance designation assigned to a public school in that district" (School accountability, 2000, § 14.3.123(c)). In Colorado, there are provisions for school districts to appeal their accreditation status to either the Commissioner of Education or the State Board of Education, depending on their status (Rules For The Administration of the Accreditation of School Districts, 1999).

Substantive Due Process. Substantive due process addresses the purposes of a governmental process and holds that they must have some legitimate purpose and be reasonable. "Legitimate educational purpose" runs much deeper than it initially sounds. Making sure that students are learning and that schools are effective certainly sound like legitimate, even laudable, educational purposes. But the legitimate purpose must be met in a manner that is fair and reasonable and not capricious or arbitrary (OCR, 2000). Substantive due process in accountability systems may become a matter of not only why the system has been constructed but also how it is constructed. The courts are traditionally reluctant to tell educators what is educationally relevant, but the courts pay very close attention to how processes and procedures are implemented. This has several implications for accountability systems.

Many accountability systems are constructed in ways that, upon further scrutiny, may not pass the fundamental fairness and reasonableness hurdle. For example, many systems measure aspects of schooling over which schools have no control. Willms & Raudenbush (1989) have differentiated two different types of school effects: Type A school effects, which include the totality of the effects of a school, and Type B school effects, which delineate only those effects over which school personnel have control. Examples of Type A effects would include community influences on the school, student socio-economic status, racial/ ethnic composition of the school, etc. Type B effects would include school policies and procedures, teacher qualifications, and resource allocation. School accountability systems which de facto include Type A school effects over which schools have no control or that confuse the two types of effects would likely be fundamentally unfair and unreasonable, and thus subject to a substantive due process claim.

Another large area of concern in substantive due process is the capriciousness or arbitrariness with which decisions about such systems are made. For example, the courts give great deference to decisions made with the advice of technical experts and with consideration to the Standards for Educational and Psychological Testing (AERA, APA, &NCME, 1999) (Coleman, 1998; Elul, 1999; Mehrens & Popham, 1992). The courts have actually been willing to accept less than adequate validity evidence when a good faith effort has been made to collect such evidence and a plan is in place to continue validation work (Phillips, 1993). This is a far-reaching point in that it covers all aspects of designing accountability systems: ignoring expert advice or failing to seek it is risking the perception of capriciousness or arbitrariness. There are, however, a few specific issues worth particular attention.

One common outcome of school accountability systems is the labeling of schools. Florida uses a letter grade system, for example (Florida Department of Education, 2000). Other states use categories like "excellent," "probationary," or "not acceptable". The criteria used to define these categories and the process employed in determining the boundaries between categories are non-trivial. Often the boundaries are set as a particular score on some composite index or on a test. There is the possibility for a substantive due process claim if these cut-off scores are not justified or validated. In Debra P. v. Turlington (1981) the court ruled that differentiating between passers and non-passers without rationally connecting that decision to the purpose for which it was designed would be unconstitutional. So how do designers make a rational connection? Two additional cases highlight these issues. In Groves v. Alabama State Board of Education (1991), such procedures were not followed; the case thus serves as a primer on capricious decision-making. This case involved the use of a minimum cut-off ACT score for entrance into teacher preparation programs. The trial revealed that the ACT was chosen because it was widely available not because it assessed aptitude for teaching (what Judge Thompson called "bizarre, irrational reasons"; Groves v. Alabama, 1991, footnote 30). The cut-score of 16 was chosen by a small group, behind closed doors, and for primarily public relations reasons, that is, they considered what cut-score the public would accept. And, though the Board of Education recommended in the adoption of the plan that validation studies be conducted on the cut-score, none were ever carried out.

The lesson to be learned is that public relations and political concerns must not be the primary or only ones considered in setting cut-off scores. It is important in a school accountability system for the cut-offs to represent reasonable expectations of performance and to be based on a process consonant with professional standards.

A better example of how to establish cut-off scores is found in U.S. v. LULAC (1986). The Pre-Professional Skills Test was chosen because of its relevance to selecting students for teacher preparation programs; validation studies were carried out; and the consequences of the cut-score were examined. The courts are often willing to accept any cut-off score that has been derived from acceptable procedures or according to acceptable professional judgment, such as the Standards for Educational & Psychological Testing (Mehrens & Popham, 1992).

One of the problems in the Groves case was the appropriation of the ACT into a use for which it was not validated. This may generalize to the use of tests in school accountability systems. The Standards for Educational & Psychological Testing (AERA, APA, & NCME, 1999) are clear that validity is the property of a score use; therefore, evidence needs to be provided for each separate use of a test score. Many school accountability systems use student achievement test information. Most often, these instruments have been developed for comparing a student's achievement to a norm group, not for measuring teacher or school effectiveness, and therefore need to be validated for those separate purposes. Failure to do so could bring rulings similar to the one in Groves.

A final concern about capriciousness involves the clarity of the expectations on examinees. Those being held accountable need to be able to understand clearly what is expected of them. Accountability systems can be quite complicated, so school administrators and teachers need to have access to succinct explanations of them. This clarity of explanation also reaches to the issue of the alignment between the content standards, the performance standards, and the tests. The Bush plan (Bush, 2001), for example, requires states to have assessments aligned with state content and performance standards. Stevens, Estrada & Parkes (1999) point out that this matching is often done in less than rigorous fashion. If that alignment is haphazard or if the standards are unclear, school administrators and teachers may not understand the expectations. Weiss (2000) notes that, unfortunately, most states' standards are "vague, shapeless and inadequate" (p. 5).

In summary, perhaps the greatest vulnerability to due process claims for school accountability systems is the speed with which they are being developed and put into operational practice. The speed alone could bring about procedural due process claims. And, systems developed so quickly may not be thoroughly designed and validated, triggering substantive due process claims.

Equal Protection Challenges

There are several regulatory and statutory foundations for equal protection challenges, beginning with the 14th Amendment to the U.S. Constitution which says that no state shall " deny to any person within its jurisdiction the equal protection of the laws" (§ 1). The fundamental principle here is that individuals must be treated equally by educational processes. This has produced some of the best-known education cases including Brown v. Board of Education (1954). It has also figured prominently in the Debra P. v. Turlington case (1981) and its 1990's cousin, GI Forum v. Texas Education Agency (2000). There are two aspects of equal protection germane to school accountability systems: disparate impact and discriminatory intent.

Disparate Impact. Disparate impact exists when different subgroups of examinees (e.g. language minorities) are selected, passed, or hired at different rates than majority groups. This concept arises from the 1964 Civil Rights Act as amended by the 1991 Civil Rights Act (OCR, 2000). These laws prohibit discrimination based on race, color, or national origin. The courts have interpreted "national origin" to include "Limited English Proficient" students (Lau v. Nichols, 1974). Sex discrimination was added to the list by Title IX and discrimination against people with disabilities by the 1990 Americans with Disabilities Act and the 1997 Individuals with Disabilities Education Amendment (OCR, 2000).

The burden of proof shifts from plaintiff to defendant throughout a disparate impact proceeding. The first responsibility is the plaintiff's to demonstrate the existence of disparate impact. Though different standards can be employed for the demonstration, two seem to be most common: the four-fifths rule (Equal Employment Opportunity Commission, 1978) and statistically significant differences (OCR, 2000). The Equal Employment Opportunity Commission Guidelines (EEOC, 1978) define disparate impact in employment settings through what has come to be known as the four-fifths rule. It states the percentage of members of a protected group hired should be at least 80% of the percentage of members of an unprotected group hired (EEOC, 1978). This standard was generalized to passing rates on a high school graduation test in the GI Forum v. Texas Education Agency case (Phillips, 2000b). It might also be generalized to show disproportionate reward or sanction of schools with large percentages of protected groups.

To illustrate this issue, we retrieved data from the internet from Florida and Virginia as examples. In Florida, 22 (16.5%) of elementary schools with a high percentage of Limited English Proficiency students received an "A" rating while 467 (33.2%) of elementary schools with a low percentage of LEP students received an "A". Employing the four-fifths rule, the percentage of high LEP schools should be no less than 80% of the percentage of low LEP schools receiving that grade. Four-fifths of 33.2% is 26.56%, fully ten percent higher than the actual percentage. In Virginia, we examined the percentage of students who received free and reduced lunch (FRL). Many of the low FRL schools were fully accredited (38.8%) while only one (0.5%) of high FRL schools were fully accredited. Four-fifths of 38.8% is 31.04%, well above the high poverty schools represented in the highest accreditation category. Such inequities could form the basis for a disparate impact claim since, in Florida, "A" schools (and schools that improved one letter grade) in 1999-2000 shared $80 million.

Once disparate impact is established, the defendant is given the opportunity to show educational necessity or justification (OCR, 2000). The demonstration of educational justification means that first, the plaintiff must show that the educational goal(s) to be achieved are legitimate (similar to the substantive due process issues mentioned earlier), and second, that the test is an appropriate method for achieving that goal (OCR, 2000). Particularly important in this demonstration would be validity evidence, particularly evidence about the test use (AERA, APA, NCME, 1999). This may translate into two levels of justification for school accountability systems. First, the goal of employing such a system would need to be justified, and evidence that the system actually achieves its purpose would need to be offered. Second, each component of the system would need to be justified -- including any tests -- and evidence that each of the components is meaningful and useful in the context of the accountability system should be provided. At this stage of a disparate impact case, the courts have often been deferential to education authorities in determining the legitimacy of educational programs, though they employ varying levels of scrutiny to the validity questions.

Finally, provided the defendant can establish the educational justification for the use of the test, the plaintiff may still offer an alternative system. The alternative must minimize the disparity, serve the same function as the original, and must require no more effort and expense than the original (Elul, 1999; OCR, 2000).

Discriminatory Intent. Discriminatory intent is disparate impact where there is an intent to under-represent a minority group. This also arises from the 1964 & 1991 Civil Rights Acts. Establishing intent is a much more difficult criterion, so few testing cases have been successfully pursued (Elul, 1999; Heubert & Hauser, 1999; Mehrens & Popham, 1992). Part of this difficulty is the fairly high standard of culpability set by the courts. Tests need to be selected "'because of'" not "'in spite of'" the disparate impact (Personnel Administrator of Massachusetts v. Feeney, 1979) in order to be successfully challenged under discriminatory intent.

Equal protection challenges are becoming less and less successful because the standards for winning such a case continue to rise (Welner, 2001). First, courts are more prone to require discriminatory intent for a suit to be successful, not simply disparate impact, and, as has been mentioned, the standards for demonstrating discriminatory intent are high.

Recommendations to Those Implementing Accountability Systems

Based on the issues reviewed here, a number of recommendations to designers and users of school accountability systems seem warranted.

1) Phase in rewards and sanctions allowing for public input into the development of such systems. There is often great political pressure to move quickly with accountability systems, but it is more important that they be done well than done fast. This will provide adequate notice to stakeholders as well as time for validity studies and other development activities.

2) Employ or hire measurement experts or consultants (Mehrens & Popham, 1992). Despite the seemingly simple goal of making sure students learn, accountability systems are subject to many technical considerations which may cause them to miss that mark. Having people with measurement expertise involved will help address many of those technical issues. This also serves as protection against substantive due process claims.
3) Follow the Standards for Educational and Psychological Testing (AERA, APA, & NCME, 1999) (Heubert & Hauser, 1999; Mehrens & Popham, 1992; Shafer, 2000). The courts in their emphasis on procedure are deferential to processes that are developed following a set of professional standards. Since most if not all accountability systems include test scores, these standards are particularly appropriate.
4) Do not ignore the advice of advisory committees and/ or experts or document departures from their advice (Mehrens & Popham, 1992). Again, with the emphasis the courts place on procedure, well-documented processes that have some rationale will be reasonably protected from legal challenge.
5) Develop a rigorous program of validation on two levels. First, the overall system needs to be validated. Does the system actually identify poor-performing schools? Does it help those schools to improve? Are the cut-scores between accreditation levels appropriate? Second, the component variables of the system need to be validated. Are they appropriate for use in the system? Is there construct-related evidence for them?
6) Ensure the fair and equitable application of such a system. Both intended and unintended consequences of such systems need to be constantly monitored (Messick, 1989).

Conclusion

School accountability systems are measurement systems and thus are subject to all weaknesses and threats of any other kind of measurement system. Among many others, the reliability of the information, the validity of the use of that information, the worthiness of the purpose of the system, and the fair and equitable consequences of the system need to be carefully addressed. States that fail to consider these measurement issues may find themselves defending their actions in court. Nonetheless, the motivation for cautious development and implementation of school accountability systems should not be liability protection but rather the betterment of education for all students. Not only will poorly designed school accountability systems face court challenge, but they will also fail to achieve their goal of improving education.

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TO DRINK OR NOT TO DRINK
CAMPUS LIABILITY FOR ALCOHOL-RELATED INJURIES
A LAW AND POLICY ANALYSIS

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The Problem

The documentation of alcohol abuse and alcohol related injuries on college campuses and the legally defined opportunities for relief continue to be areas of concern for higher education administrators. To many, combating alcohol abuse on campus is a response every institution should initiate to address one of the nation's most serious social problems. The uniqueness of an institution of higher learning, its special opportunity for cognitive enhancement and the social environment of a campus all play a role in campus alcohol use policies and the legal implications of alcohol related injuries to higher education institutions.

The problems associated with alcohol abuse and alcohol related injuries are not new to college campuses or society in general. Excessive consumption has been a part of collegiate life. Various studies place the percentage of college students who consume alcohol at anywhere from 50 to 90 percent (Gallop poll, 1977; Presley, 1994; Presley and Meilman, 1992). In addition to the recent study noted in the Chronicle of Higher Education in March, 2000, Henry Wechsler in a 1996 study reported that 44 percent of the college students he surveyed were "binge" drinkers.

The cost to colleges of alcohol abuse is significant, a cost that drains academic dollars from the classroom where it is sorely needed. Research indicates that alcohol-related misconduct is the primary reason for disciplinary action on college campuses (Gonzales and Wiles, 1981). Academic failure has also been linked with alcohol consumption by several studies (Engs and Hanson, 1985; Seay and Beck, 1984). Gadaleto and Anderson (1986) indicated that alcohol usage was reported as being involved in 61% of residence hall damages, 60% of violent behavior; 53% of damages to other campus property and 51% of the violations of campus rules.

Alcohol use frequently accompanies criminal activity on campus. On campus, about half of the assailants in courtship violence have been drinking, and campus law enforcement officers regularly report, anecdotally, that alcohol is a factor and a very large part of campus violence (Bogal-Allbritten and Allbritten, 1985). Furthermore, a study issued by the Center for the study of Crime and Prevention of Campus Violence at Towson State University reported that nearly two-thirds of students who admitted to having committed crimes said that they had been under the influence of drugs, alcohol or both at the time the crime was committed (Dodge, 1990). In addition, the risk of being a crime victim increases for students who use drugs or alcohol. The Towson State study revealed that student crime victims drank and used drugs more frequently that non-victims, had lower-than-average grades, and tended disproportionately to be fraternity or sorority members (Matthews, 1993).

Drinking on campus is not restricted to fraternity or sorority membership although membership is the best predictor of binge drinking (Wechsler, 1996). White males drink the most and are most likely to binge with white females close behind (Engs and Hanson, 1985). Research also indicates that students who have friends who did not discourage drinking are more likely to consume alcohol (Lo and Globetti, 1993; Alva 1998). Further, students often drink because they think everyone else does (Haines, 1996) and they overestimate the amount others drink (Berbowitz and Perkins, 1986).

In 1829 drunks were considered to be someone you poked fun at as evidenced by the poem contained in a New York court's opinion:

> Not drunk is he who from the floor,
> Can rise alone and still drink more,
> But drunk is he who prostrate lies,
> Without the power to drink or rise
> People v. Williams (1829).

Drunks are no longer funny but are instead a source of potential liability that must be addressed by higher education administrators.

The recent reports of alcohol related deaths on college campuses combined with renewed efforts on the part of colleges to change their social environment to reduce alcohol abuse indicates a ripeness for new court decisions regarding a college's legal responsibility for alcohol related injuries.

The Legal Landscape

In the 1970s and 1980s courts ceased relying on the concept of *in loco parentis* and started approaching lawsuits using duty rules. In the role of bystanders, colleges had no legal duties to students; thus, they were not legally responsible for harm to students. The courts used the death of *in loco parentis* to determine that universities could not control student actions and were therefore not responsible when bad things occurred.

Four cases, Bradshaw, Baldwin, Beach and Rabel highlight the no duty decisions. The Bradshaw facts portrayed a system of alcohol use broken or besieged at every point. Underage students were led to irresponsible, unlawful drinking and the inevitable drive home from an off-campus party. Beach involved an underage freshman biology student rendered quadriplegic during a required field trip that was supervised by a professor. The professor and the underage students consumed alcohol at a lamb roast and later at the campsite. Beach got lost and fell into a ravine. Modern universities conduct numerous field trips, externships and study abroad programs as an integral part of courses and summer programs. The Beach scenario could occur again at any time. Beach, like Bradshaw, involves the deliberate use and abuse of alcohol and the difficulties of monitoring and facilitating students' alcohol use by university officials.

Baldwin involved a student injured in a car wreck that was the product of a speeding contest that was the end result of underage drinking at a university dormitory. The students were underage, yet had consumed alcohol on campus in violation of university rules prohibiting their alcohol use and in violation of California law (Baldwin at 812). In Baldwin the university not only failed to enforce anti-drinking rules on the night of the race, but generally looked the other way regarding on-campus drinking in its dormitories. The culture was one where rules and catalogs conveyed the image of regulated liquor consumption but in reality just the opposite was the case. Finally, Rabel involved a young female student who was injured when a male student, involved in a fraternity activity after a liquor friendly party, abducted her and then ran a gauntlet of fraternity brothers who struck him as he passed. The student fell while running through the gauntlet causing Rabel's skull to be crushed and inflicted life-altering head injuries to her.

In each of the above cases, the courts found the university was not legally responsible because there was no legal duty. Basically, universities had no affirmative duty to protect their students from student-created injuries, particularly those involving alcohol. In other words, courts were telling universities do not cause harm, do not get involved, do not worry, be a bystander.

The late 1980s through the 1990s have seen a steady erosion of no-duty-to-student bystander case law and the rise of successful student litigation regarding physical safety on campus. The case most noteworthy as signaling the beginning of the end of the bystander era is Furek v. University of Delaware, (1991). Furek consisted of a hazing incident involving alcohol use. A number of events transpired to lead the court away from the bystander era. First, the university had a policy against hazing, but it was not properly implemented. The campus police were not properly instructed concerning the university's policy. There were formal policy statements and announcements regarding fraternity-related disorder and danger, but the court found there was an insufficient plan of implementation. The court determined that the university guided many aspects of student life including housing, food, security, extracurricular activities and student life. Further, the court stated students are not solely responsible for their safety simply because they are adults. Finally, the court held the fact that students may be adults did not make university concerns and efforts related to student alcohol use inappropriate. Basically, Furek established that universities, when starting something must finish it properly when people (mainly students) have come to rely on what you have started. The duty of Furek was only that of reasonable care.

The imposition of reasonable care as suggested by Furek is still somewhat at odds with the four no-duty era cases which were alcohol-related. Even under the duty standard cases involving beer and liquor tend to weigh substantially towards no college liability. The basis for this trend is found in cases like Beach, Baldwin and Rabel that basically held students assumed the risks of alcohol use–on campus, off campus and even the risks of other students drinking. Also, the courts noted the sense of futility of curtailing drinking by college students. Several trends are worth reviewing in determining the future of alcohol related injuries and campus liability. Public policy regarding alcohol use and abuse by college students is under review. Basically, social mores about drinking and liability may be shifting and with that shift may come tort law revisions. Further there appears to be a sense of urgency about liquor problems on campus and efforts to address them are being implemented by a number of universities. Finally, the attitude that all students, drinkers and non-drinkers assume the general risks of alcohol use appears to be waning and perhaps it is foreseeable that students are not solely responsible for alcohol-related injuries. The rules of duty may be changing. A recent decision issued by the Nebraska Supreme Court in Knoll v. Board of

Regents of the University of Nebraska (1999) held the University of Nebraska had a duty to protect a fraternity pledge who was injured while trying to escape a hazing incident. The lower courts had held the university owed no duty to the pledge. The pledge was handcuffed to a radiator and forced to consume massive amounts of alcohol. In an effort to escape, the pledge fell while sliding down a drainpipe and suffered head injuries. The court similar to Furek, found the university had been aware of criminal conduct involving members of the fraternity prior to the incident. The court determined the university was obligated to take reasonable steps to protect against foreseeable acts of hazing. The court did not decide whether the university breached its duty to protect or if a breach was the cause of the injuries. That decision must await a full trial. It is noteworthy that the allegations suggested the university failed to enforce prohibitions against hazing, alcohol consumption, and physically abusive behavior.

The imposition of liability for providing alcohol is a concern all universities should take notice of in preparing its campus alcohol policy. Since the demise of the *in loco parentis* doctrine and the campus revolution of the 1960's, the extent to which a university can, or should interfere in the lives of its students has been in question. Meanwhile, America seems to have reached a crossroads in its attitude towards drinking, and most definitely in its attitude towards drinking and driving. At the same time, America's young adults attending college are too young to legally drink alcohol, but at the same time too old to be controlled as children by their university administrators. As a result, the media and the public have gone on a crusade to get the drunk driver off the road, while the young who represent the portion of the population most endangered by the drunk driver, have continued the binge.

The role of the university in this conundrum — and the question of its liability to its students and to third parties injured by the students after they have been imbibed at university connected events — is a question with no easy answer.

Administrator's Perceptions

The purpose of this paper was to identify and analyze (1) the influence of tort liability for alcohol-related injuries that led to the formation of campus alcohol policies at institutions participating in the Robert Wood Johnson Foundation program, "A Matter of Degree: Reducing High-Risk Drinking Among College Students" program, (2) the social and legal influences that shaped the contemporary campus alcohol use policies at these institutions, (3) recommendations for future alcohol-use policies.

Interviews with student affairs administrators provided insight into the various catalysts that prompted changes to existing campus alcohol policies. The interviews further provided insight into the influences that shaped the formation of alcohol policies at institutions participating in the RWJF grants. Finally, a search to identify case law regarding campus liability for alcohol related injuries discovered three lines of cases that are illustrative of a campus' duty of care that could support a finding of university liability.

Summary of Student Affairs Administrators Interviews

The institutions were chosen based on their participation in the Robert Wood Johnson Foundation grants program: "A Matter of Degree: Reducing High-Risk Drinking Among College Students". Ten administrators responded and nine agreed to be interviewed.

A review of the data obtained during the interviews revealed four major themes that ran consistently through the interviews. The themes were categorized under the following titles: (a) Change catalysts, (b) Local influences on policies, (c) Post implementation changes, (d) Fraternities and the Massachusetts Institute of Technology incident.

Change Catalysts

A common theme found in all the responses related to the catalyst, or multiple catalysts, that led to the revisions of a university's campus alcohol use policy. By far the greatest impetus for change came from alcohol problems related to residential life. Residential life personnel reported problems with residential hall damage, vandalism and noise, all associated with alcohol use.

A second strong catalyst reported by many participants was the results of a CORE alcohol survey study administered by their campus or as a part of the Harvard alcohol study. About half of the participants identified the university president as an important catalyst for prompting changes in alcohol use policies. Other catalysts described by the participants included a desire to clarify and unify present alcohol-use policies into one consistent policy that complied with federal and state law.

Local Influences on Policy

Most universities created task forces to study campus alcohol-related problems and design a new alcohol use policy. Some were fortunate to have obtained their Robert Wood Johnson Foundation grant prior to the creation of their policy, others made their changes earlier and simply modified or enhanced their alcohol abuse prevention after receipt of the grant. The task forces ranged in size from two to over a dozen members. Most task forces included representatives from residential life, campus police, campus counseling, campus health clinic, President's office, and student representatives from the student government, Greek system and residential housing. Public members often included representatives from the mayor's office, local law enforcement, Chamber of Commerce and alcohol industry. In all cases, university counsel reviewed the policies to be sure they complied with federal, state and local laws and regulations. All of the participants or their predecessors were members of the task force.

The primary concerns in drafting the policies can be grouped into three general categories and are based on the problems related to the consumption of alcoholic beverages. The first related to physical injuries to self and others, property damage and fighting. The second concerned damage to social relations. The third involved impaired academic performance (inefficiency in homework, classroom or lab performance; late papers, missed classes or exams; failure to study for exams, inability to perform academic functions due to disruptions caused by students consuming or having consumed alcoholic beverages).

Based on the above concerns, the participants rated influences on the formation of the policies, which when analyzed revealed that the number one influence was improvement of the campus learning environment and campus security. The concerns of the residential hall staff and students in resident halls most influenced the policies. The concern regarding management or supervision of fraternities was rated second most influential in policy development. The president in most cases was a "pro-policy" change agent or at a minimum acted as a neutral person regarding change. Town-gown issues were reported as influential by a few participants, but were not significant for any participants. Finally, the potential for tort liability for alcohol related injuries was near the bottom for all participants, save one, although all participants indicated they were concerned about tort liability.

If the responses of these participants represents an accurate view of all the recent task forces utilized on American campuses to revise alcohol use policies, the results suggest several interesting things. First, student affairs administrators believed the creation of a positive and safe learning environment was of paramount importance; thus, the alcohol-use policies attempted to meet the goal of a good learning environment even if the alcohol-use policy increased the potential for tort liability. From a policy standpoint, these student affairs administrators, while concerned about tort liability, were more concerned about the welfare of their students; therefore, the policies that were enacted were primarily designed to create a more positive and safe learning environment.

Post-Implementation Changes

Although not directly related to the issue of influences on alcohol-use policies, post-implementations were important as justifications for the continued use of the implementation of the alcohol-use policies. The participants reported numerous post-implementation changes in student alcohol use that they associated with the new policies. One change reported by participants indicated rates of reported vandalism, disruptions, assaults and fighting in residence halls went down significantly. Another change indicated the use of alcohol at athletic functions went down and was restricted to limited areas. Research regarding alcohol use and abuse increased, thus providing hard data to analyze problems and intervention strategies. Parental notifications apparently reduced second and third offenses.

A concern expressed by most participants involved the perception that students were leaving the "friendly" confines of the campus and drinking in town or in cars. The issue of liability for students leaving campus to drink and drive was noted by several participants; however, unless their university policy applied to off-campus activity they believed there was little they could do. Most administrators expressed the belief that alcohol-related incidents were down, but that alcohol consumption probably had not been significantly reduced. All the participants believed the process of changing the drinking culture would be slow because alcohol use and abuse was a societal problem that did not suddenly materialize when a student enrolls in college. The signal a student receives from the community is often times contrary to the message of the university.

Fraternities and the Massachusetts Institute of Technology

All of the participants discussed their concerns regarding fraternities and alcohol use and abuse. Each university was different in its approach to alcohol issues related to fraternities. The two extreme positions were represented by the University of Colorado which took a hands off approach, and the University of Delaware, with its five star recognition program. The five star program awards points and credits to Greek organizations based on five categories: (1) academic performance, (2) financial management, (3) community service, (4) leadership, and (5) quality of membership intake. Less than a three star rating means the loss of social privileges. Regardless of the university approach, several common factors emerged during the interviews.

The primary issues surrounding fraternities involve whether the fraternity houses are owned by the university and whether they are located on campus. Issues of landlord liability and premises liability exist for fraternity house owned by universities or located on university land. Application of alcohol policies also depends on the status of fraternities with the university.

Most participants agreed fraternities were a problem because of their alcohol culture and strong alumni support. However, as discussed above, the approach to working with fraternities varied among institutions. One issue that was addressed by all the participants was the Massachusetts Institute of Technology ("MIT") situation that ended in the death of Scott Krueger due to an overdose of alcohol. Most participants believed MIT's alcohol culture contributed to the incident. The perception among the participants was that the administration at MIT knew about the alcohol problems that existed in its fraternities and yet chose to do little about it. Housing at MIT is limited and fraternity houses are considered sanctioned housing by the university. Despite numerous violations, the administration at MIT allowed the fraternity house at issue to remain open. Most participants expressed the belief that MIT's housing policies led parents of entering students to believe fraternity houses were appropriate housing for their students and that the houses were monitored by the university, which proved not to be the case.

The results of the student affairs administrators interviews suggests most college and university administrators are not going to ignore student conduct or activities that invite danger such as alcohol abuse. Adopting policies of deliberate indifference is professionally distasteful to them. One participant was adamant that a hands off approach would be a disaster. "We believe it is better to show we care and attempt to protect our students instead of pushing the problem off-campus." Actually, most student affairs administrators believe that deliberate indifference increases the chances of student injury and enhances the likelihood of a finding of negligence. The popular approach is to defeat a lawsuit by avoiding the injury in the first place.

A review of the student affairs administrator interviews indicates these colleges are not disengaged from student life. Most have taken affirmative steps to protect the environment in which risks occurs. In most instances, a college which features substantial on-campus housing, sanctions and regulates Greek life, and provides a panoply of student services has engaged itself in student life to a point where withdrawal or disengagement from student life and safety issues such as alcohol use, would be impracticable and unprofessional. It does not appear that the creation of regulations alone is what engages a college. Instead, it is the creation of a guided, facilitated environment which suffuses student/university relationships with a responsibility of reasonable care to guide student growth and development. In fact, the student affairs professionals stated their role was that of student developers and all had a problem with legal rules that encouraged disconnection or passivity in student/administrator relationships.

Responsibility for Student Alcohol Use

The Bradshaw line of cases were all alcohol related injury cases. Furek and its prodigy are not all alcohol cases. In most instances, cases involving beer and liquor weigh substantially against college liability. In the cases of Bradshaw, Beach, Baldwin and Rabel, students assumed almost all the risks of alcohol use - on campus, off campus and even risks associated with other students who were drinking. The courts of the past have basically treated alcohol use on campus like a dangerous college sport, with known and obvious dangers. There appear to be a number of reasons for this. One is that legal rules still tend to treat liquor liability within narrow boundaries. For example, social hosts have historically not been subject to law suits. Another reason is the continued sense of futility described by the student affairs administrators that college-aged drinking is an inevitable feature of college life.

Another reason appears to be that many plaintiff/victims have not invoked sympathy from the courts. In cases like Beach, it is the drinking student who seeks refuge in tort law. The more recent case of Albano v. Colby College, (1993) supports this position. In Albano, an underage member of the college tennis team was hurt on an annual trip to Puerto Rico following his excessive consumption of alcohol, which the coach specifically prohibited. The courts tend to see the consumer as assuming the risk and generally bar recovery. Tort liquor liability is generally reserved to protect innocent third parties, not drinkers. If the tort issue is presented as a premises/dormitory safety issue, assumed duty, and/or control of dangerous persons, a student tends to fare better than if the claim is that liquor caused or facilitated the injury.

Basically, courts still reject college liability for student liquor injuries in most circumstances as described below. The Colorado Supreme Court in University of Denver v. Whitlock, (1987) found that a university was not liable for injuries suffered by an intoxicated student as a result of his use of a trampoline at a campus fraternity although the lower courts did find for the student. The Supreme Court required a special relationship be shown.

In Hartman v. Bethany College, (1992) a federal court found against a college freshman who claimed that because she was a minor, the college had a duty to prevent her off-campus drinking.

In Booker v. Lehigh University, (1993) a federal case, a female student admitted she voluntarily consumed significant alcohol before she fell on a rock trail as she went home to her sorority. Booker asserted that the university had a general duty to control student consumption of alcohol on campus and that a breach of this duty caused her to fall. The federal court disagreed, but did note that if the university, not a fraternity, had served liquor or otherwise planned or purchased and supplied liquor, the result would have been different.

In cases where students have become intoxicated and been attacked suddenly by other students, the courts have ruled against the victims in the absence of some foreseeability L.W.V. Western Gulf Association, (1997) and Tanya H v. Regents of the Univ. of Cal., (1991).

The Next Evolution

Based on the jurisprudence described above it appears that the mere fact that a university regulates alcohol use does not create a specific duty to particular individuals. In spite of the jurisprudence above, there is evidence of a shift away from a no liability approach in cases involving student alcohol-related injuries. For example, in Furek and Booker, the courts placed accountability on the university, if it supplied liquor or planned the activity. Furek rejected the culture of non-enforcement of liquor/hazing rules. Fundamentally, the basic reasons courts traditionally found no liability are coming under fire in social policy circles. What was reasonable conduct in the 60s, 70s and 80s may not be considered reasonable conduct for tort law purposes in the 90s and the new millennium. For example, there has been an increase in responsibility for liquor injuries beyond the traditional bar and vendor categories by establish social host liability. Second, there is a push to resolve perceived liquor problems on campus illustrated by the recent rash of alcohol related deaths and the funding of changes by the Robert Wood Johnson Foundation. There also appears to be a shift in attitudes toward the young students who are victims and drinkers. There appears to be an increasing sentiment from the public and parents that general risks of alcohol use are specifically foreseeable and that students are not solely responsible for alcohol-related injuries. Two recent events illustrate this shift, a hazing case from Nebraska and an alcohol-related death at MIT.

In November 1999, the Nebraska Supreme Court in Knoll v. Board of Regents of the University of Nebraska, (1999) ordered a trial to determine whether the University of Nebraska had failed in its obligations to a 19 year old freshman pledge with the Phi Gamma Delta ("Fiji") fraternity. The court ruled the University of Nebraska had a duty to protect a fraternity pledge who was severely injured while trying to escape a hazing incident.

The court records indicate that as part of a pledge event, four or five members of the fraternity confronted Knoll in the basement of an academic building, tackled him, and handcuffed him to one of the members. Knoll was taken to the fraternity house; handcuffed to a radiator and forced to drink 15 shots of whiskey and brandy and three to six cans of beer. Knoll became sick and was taken to a third-floor bathroom and handcuffed to a toilet pipe. Later, Knoll broke free and tried to escape through a bathroom window by sliding down a drainpipe. Knoll fell and suffered head injuries leaving him brain-damaged. The Phi Gamma Delta house is on land owned by the fraternity's alumni corporation, but the fraternity is considered on-campus housing and is subject to Nebraska's student code of conduct.

The Nebraska Supreme Court noted several important items in reaching its decision. First, the university had been aware of criminal conduct involving members of Phi Gamma Delta during the five years preceding the accident. One member had been convicted of sexual assault, one was found drunk and unconscious, while two others had attempted to break into a sorority house. The university was also aware of hazing activities by at least two other fraternities. The Supreme Court ruled the University of Nebraska was obligated to take reasonable steps to protect against foreseeable acts of hazing, including abduction of students on the university's property, and that harm naturally flowed from the university's failure to act. A similar finding regarding alcohol use and misuse on campus could be consistent with the court's reasoning. The damages sought by the Knoll family are based on allegations that the university had a duty to protect Knoll because he was abducted by the fraternity members on university property, and that the university failed to enforce prohibitions against hazing, alcohol consumption and physically abusive behavior. Knoll is important in that it opens the door for tort liability based on the university's failure to protect against foreseeable acts of alcohol abuse and the harm that naturally flows therefrom .

The most recent and perhaps most significant case is not a case at all, but a settlement that never went to trial. In September 2000, the Massachusetts Institute of Technology ("MIT") agreed to pay six million dollars and to acknowledge some responsibility for the alcohol-related death of Scott Krueger, an 18-year-old fraternity pledge. The background to this settlement is documented not in published opinion but instead is reported by Leo Reisberg of the Chronicle of Higher Education.

Long before Krueger drank himself to death at a Phi Gamma Delta initiation event, numerous signals were present that the social life in the Greek system at MIT was out of hand. In 1996, three Boston College students were hospitalized on separate occasions for alcohol poisoning after partying at Phi Gamma Delta at MIT. The dean for student development at Boston College requested help from MIT to address the issue. Neighboring college administrators reported MIT had a long history of ignoring complaints about hazing and dangerous drinking in its Greek system; however, a shortage of student housing led MIT to continue to funnel freshmen into unsupervised fraternities. The Suffolk County District Attorney's Office, after spending a year investigating the death, decided not to charge university administrators, but did file manslaughter charges against Phi Gamma Delta. The charges did not proceed because the chapter disbanded. In an un-precedented move, MIT revoked the diploma issued to Krueger's pledge trainer after he graduated from MIT.

MIT originally took the position that the university's housing system had nothing to do with Krueger's death and that the university could not be legally responsible for the actions of individual students in privately owned houses. MIT housing brochures stipulated that first year students were required to live "on campus" in "institute housing," however, the definition of "institute housing" included fraternity houses, many of which were located across the Charles River, in Boston, about one mile from campus. Four days after his arrival at MIT, Krueger pledged and moved into the Phi Gamma Delta house. On the night at issue the pledges were told to gather together at 8:30 p.m. to watch the movie Animal House, and collectively drink a certain prescribed amount of alcohol. The chapter's pledge trainer gave the initiates beer and a bottle of Jack Daniel's which they consumed prior to meeting their big brothers. Krueger's big brother gave him a bottle of Bacardi spiced rum. Throughout the evening, Krueger complained of nausea and finally lay down on a couch. When he began to lose consciousness, two students carried him to his bedroom, placed him on his stomach and put a trash can next to his bed. Later Krueger was found unconscious and covered in vomit. A fraternity member dialed campus police. Krueger lapsed into a coma and died 40 hours later from alcohol poisoning and from suffocating in his vomit.

In response to the incident, MIT and the national fraternity suspended the chapter. The Boston Licensing Board, which issues housing, restaurant and alcohol licenses, revoked Phi Gamma Delta's "dormitory license." Daniel Pokaski, a Boston Licensing Board commissioner blamed MIT for allowing Krueger to join a fraternity for which he was not prepared. "It was a total abrogation of what a university should be doing, which is to guide people on their own for the first time" (Reisberg, 2000). The Boston Licensing Board had issued two previous warnings to Phi Gamma Delta, in response to two large parties there, in February, 1996 and February 1997. Further, investigators reported that police and paramedics were called to Phi Gamma Delta 15 times in the 5 years before Krueger's death.

The settlement with MIT includes 1.25 million dollars to endow a scholarship fund established in the name of Scott Krueger and Reisberg (2000) also reported 4.7 million dollars in compensatory damages for the family. The President of MIT acknowledged in a letter to the Kruegers that "the death of Scott as a freshman living in an MIT fraternity shows that our approach to alcohol education and policy, and our freshman housing options, were inadequate." Under campus housing policies at MIT, first year students must decide within a few days whether to live in a dormitory or a fraternity house. The Phi Gamma Delta house was considered institute-approved housing despite a significant history of alcohol-related incidents. For its part, MIT has since Scott Krueger's death promised to make several changes to its housing and alcohol policies to address the concerns raised by the incident. By August 2002, all freshmen will be required to live in dormitories, and fraternity and sorority rush will no longer take place during freshman orientation.

The Nebraska and MIT incidents both involved alcohol use by underage students. Although the MIT case will not go to trial and the Nebraska case has not concluded, it appears that a significant shift in the evolution of tort liability for alcohol-related injuries is occurring. Whether it's a social policy change or a modern view of reasonable care, courts appear willing to hold a university responsible to take reasonable steps to protect students against foreseeable acts of hazing and alcohol abuse and the harm that naturally flows therefrom. Universities today are addressing the use and abuse of alcohol by students and have adopted policies to guide students and comply with state and federal law.

Recommendations

A university's legal liability for alcohol-related injuries is an evolving concept that has yet to be fully defined. Higher education institutions and student affairs administrators should continue to monitor the development of this legal concept. In its present condition, universities would be prudent to follow the two "Ps" that appear important to the courts, "Presence and Preparation." Even with the new policies, administrators reported alcohol-related incidents were down but no evidence suggested alcohol use was down. Accordingly, it appears safe to assume that alcohol-related injuries will continue to occur in the future. Based on the reasoning of courts, universities can take steps to reduce their exposure to tort liability.

First, universities can be prepared by adopting and promulgating contemporary alcohol use policies that contain provisions designed to reduce underage drinking and foster a positive learning environment and a safe campus. The adoption of contemporary alcohol use policies should demonstrate to the court that the university is prepared to handle underage drinking and alcohol abuse. The existence of an anti-hazing regulation saved the university in Furek from punitive damages because the court believed the university was trying to stop hazing. A university must also adopt reasonable alcohol-use policies that can be properly enforced to avoid creating a false sense of security that leads parents and students into a belief that either alcohol abuse does not exist at the university or that it is always promptly addressed. Campus police must consistently enforce the policies and not turn their heads from obvious violations.

Once the university establishes it is prepared to handle alcohol use and abuse on campus, the second element, presence must be established. The courts' reasoning in the Furek line of cases indicates a lack of presence or action on the part of the university led to a finding of liability. Although the MIT case did not go to trial, it appears that the lack of university supervision over the fraternity house, which was "approved university housing," led to the settlement at MIT It would be dangerous for universities to rely too heavily on the absence of university presence in the Bradshaw line of cases as a means of avoiding liability. These cases are older and based on society's changing image of alcohol use it is uncertain that these cases would be decided the same way today.

Educators and administrators should be aware of the university's potential for tort liability for alcohol-related injuries and not turn their heads from violations of university policy. The old days of "Animal House" parties may be coming to an end and burying one's head in the sand is no longer a viable way to avoid liability nor is it the way student affairs administrators believe universities should conduct themselves.

A university should consider adopting alcohol-use provisions and procedures similar to the provisions and procedures set forth below when addressing the issues of presence and preparation in avoiding tort liability for campus or student alcohol-related injuries:

(1) Locations and times where alcohol may be consumed should be restricted;

(2) Limitations should be placed on where alcohol can be sold;

(3) If alcoholic beverages are served or available, non-alcoholic beverages in addition to water, should be available at no cost;

(4) Certified and trained alcohol servers, capable of recognizing the signs of intoxication and empowered to stop service, should be required for all functions where alcoholic beverages are available;

(5) The use of beer kegs and other self-serving alcohol dispensers should be prohibited;

(6) The quantity of alcohol available at a function should be based on the anticipated attendance;

(7) Food should be available at all events where alcoholic beverages will be available and limits should be placed on foods with high sodium content;

(8) Drinking games should be prohibited;

(9) Security should be available at all functions where alcoholic beverages will be available;

(10) Methods for identifying and restricting alcohol service to underage individuals must be established and followed;

(11) Special permits should be required prior to serving alcohol at functions. The permits should only be issued after an organization establishes it has complied with all of the university's requirements for service of alcohol;

(12) Advertising for alcohol should be restricted and functions with alcohol available should not be advertised as alcohol being the primary purpose of the function;

(13) Supervisors should be trained to monitor procedures and functions;

(14) Campus police should be trained and empowered to respond to alcohol-related problems;

(15) Alcohol-use policies should be realistic and enforceable;

(16) The adopted provisions should be enforced consistently and fairly;

(17) Supervisors and administrators should be trained and instructed not to ignore violations;

(18) Due to the ever-changing state and local laws regarding alcohol-use and tort liability, university counsel should be consulted to be sure local laws are being followed and not violated.

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THIRTY YEARS OF SPECIAL EDUCATION LAW: THE LONG AND WINDING ROAD FROM A SCHOOL ATTORNEY'S PERSPECTIVE

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

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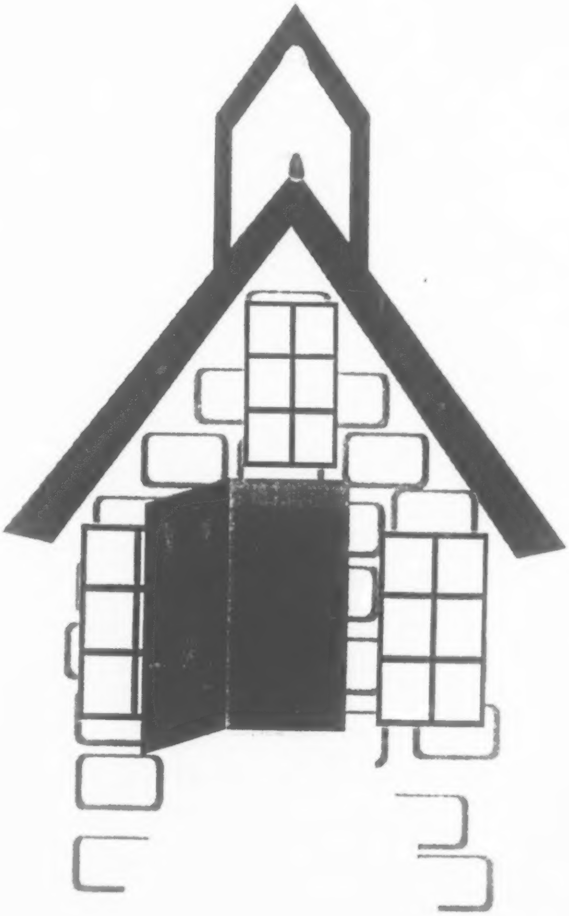
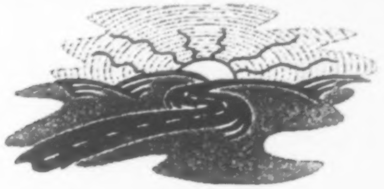


The Long and Winding Road



Presented by
Elena M. Gallegos
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.

. . . That leads to your door . . .

Mr. Jefferson's Plan for Scholarships for the Poor

> By this means, twenty of the best geniuses will be raked from the rubbish annually, and be instructed at public expense.

Thomas Jefferson
1777 Plan for Public Education
Commonwealth of Virginia

. . . Will never disappear . . .

The Interest of the State in
Compelling School Attendance

No question is raised concerning the power of the state reasonably . . . to require that all children of proper age attend some school. . .

[Note: Exempt from the state compulsory school at issue in this case were children who were abnormal, subnormal, or physically unable to attend school.]

Pierce v. Society of Sisters
268 U.W. 510 (1925)

. . . I've seen that road before . . .

Conditions Before IDEA

Thirty years ago, only one-fifth of all United States students with disabilities were being educated. By 1970, only seven States were providing education to more than one-half of their students with disabilities, and many States had laws specifically excluding certain students, such as those who were blind, deaf, emotionally disturbed, or "feeble-minded" (Weintraub, Abeson & Braddock, 1971).

The Individuals with Disabilities Education Act 1975-2000, OSEP, U.S. Department of Education.

. . . I've seen that road before . . .

Equal Educational Opportunities

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education
347 U.S. 483 (1954)

. . . It always leads me here, lead me to your door . . .

Education for all Handicapped Children Act of 1975 (P.L. 94-142): Individualized Guarantee to a FAPE

A State is eligible for assistance under this part ... if the State demonstrates... that the State has in effect policies and procedures to ensure... a free appropriate public education is available to children with disabilities residing in the State between the ages of 3 and 21, inclusive.... 20 U.S.C. 1412(a).

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. . . The wild and windy night . . .

President Ford's Prophesy Regarding P.L. 94-142

Unfortunately, this bill promises more than the federal government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains....

Even the strongest supporters of this measure know as well as I that they are falsely raising the expectations of the groups affected by claiming authorization levels which are excessive and unrealistic.

....The funding levels proposed in this bill will simply not be possible if federal expenditures are to be brought under control....

Comments of President Ford,
Signing P.L. 94-142 into law, December 2, 1975

. . . The wild and windy night . . .

President Ford's Prophesy (con't)

There are other features in the bill which I believe to be objectionable and which should be changed. It contains a vast array of detailed, complex and costly administrative requirements which would unnecessarily assert federal control over traditional state and local government functions. It establishes complex requirements under which tax dollars would be used to support administrative paperwork and not educational programs. Unfortunately, these requirements will remain in effect even though the Congress appropriates far less than the amounts contemplated in [the law].

Comments of President Ford,
Signing P.L. 94-142 into law, December 2, 1975

. . . That the rain washed away, has left a pool of tears . . .

Equal Educational Opportunity Not Enough?

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that states provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement....

Board of Education v. Rowley
102 S.Ct. 3034 (1982)

. . . Crying for the Day . . .

From Equality to Individualization: U.S. Supreme Court Interprets FAPE

1. Compliance with the procedural requirements of the Act.
2. An IEP that is reasonably calculated to enable the student to receive an educational benefit.

Board of Education v. Rowley,
102 S.Ct. 3034 (1982).

. . . Crying for the Day . . .

From Equality to Individualization

The issue is whether [a state that receives federal funds under IDEA] may refuse, in formulating IEPs for children within the school system, to consider the possible necessity for programs extending beyond 180 days per year. We hold that such a policy violates the Act's mandate that an [IEP] be designed to meet the personal needs of each handicapped child.

The Act requires the State to treat each child as an individual, a human whose unique qualities and needs can be evaluated and served only by a plan designed with wisdom, care and educational expertise. Its grand design does not tolerate policies that impose a rigid pattern on the education of a child. Each IEP must be prepared on the basis of an individual evaluation of a particular boy or girl. The child and his parents and guardians can exact no more. The State must provide no less.

Crawford v. Pittman
708 F.2d 1028 (5th Cir. 1983)

. . . Why leave me standing here, let me know the way . . .

We Reject No One

The language of the [IDEA] could not be more unequivocal. The statute is permeated with the words "all handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children . . . The language of the Act in its entirety makes clear that a "zero reject" policy is at the core of the Act and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed [in 1975, when] millions of handicapped children received inadequate education or none at all.

Timothy W. v. Rochester, N.H. School District
875 F.2d 954 (1st Cir. 1989)

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. . . Many times I've been alone . . .

Right to Reimbursement U nder the IDEA

A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course . It would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not . Be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief, Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Burlington School Committee v. Dept. of Education
105 S.Ct. 1996 (1985)

...And many times I've cried ...

Right to Recover Attorney's Fees Under the IDEA

In any action or proceeding brought under this section, the Court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party.

Handicapped Children's Protection Act of
1986, 20 U.S.C. 1415(i)(3)(B)

... And many times I've cried ...

Services Necessary for Student to Attend School

Summary of Facts: The student required the aid of a one-on-one qualified health care provider who could assist him with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, eating and drinking at lunch time, and ambu bagging occasionally, as needed, when the ventilator was checked for proper functioning. Additionally, the health care provider would have to be able to repair his ventilator in the event of a malfunction, and perform emergency procedures in the event he experienced autonomic hyperreflexia.

Cedar Rapids Community School District v. Garret F.
119 S.Ct. 992 (1999)

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… And many times I've cried …

Schools Must Finance Related Services Necessary for Access Regardless of Cost

Through its multi-factor test, the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested service.... The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law.... Given that Section 1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA.... Congress intended "to open the door of public education" to all qualified children and "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible." [Citations omitted.] .... Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

Cedar Rapids Community School District v. Garret F., 119 S.Ct. 992 (1999)

. . . Anyway, you'll never know the many ways I've tried . . .

How Do We Deal with All Who Want In On the Act?

In Compton, Calif., a Los Angeles suburb that has long been mired in poverty and poor achievement, one of every 12 students-about 8 percent-is classified for special education.

On the other side of the continent, in the well-heeled New York City suburb of Greenwich, Conn., the proportion is more than twice as high. In a district where the average price of a house is more than $1 million, about 18 percent of students fall into the special education category.

"Special education has a lot of children in it who aren't really disabled, and instead of special education, they need something special in their education." ... "It is a pretty complex problem."

Education Week, Vol. XVII, Number 41, June 24, 1996

. . . Anyway, you'll never know the many ways I've tried . . .

How Do We Deal with All Who Want In On the Act?

Often, other factors intervene, notably the wishes of the parents.

Some parents want to avoid what they see as the stigma of special education and refuse the designation for their children even though they may badly need it. Other parents are willing-even eager to accept the label, knowing that it will snag extra services for their children.

"I've had parents who wanted their child identified as special education because they wanted a tutorial service."

"Parents really tend to expect a customized education as they might get in a private school. "

"They're demanding it because it's really the only act in town. It's how you get help if your child is struggling. "

[A]n evaluation team might "make a decision out of sympathy rather than the child meeting the criteria" for a certain disability, because the needed services were not available through the regular classroom.

Education Week, Vol. XVII, Number 41, June 24, 1996

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. . . Anyway, you'll never know the many ways I've tried . . .

How Do We Deal with All Who Want In On the Act?

Recently, members of the Region IX staff of the United States Department of Education, Office for Civil Rights (OCR), expressed the opinion that school districts must provide native language instruction to special education students even if the school district provides English as a Second Language (ESL) or English Immersion Program for regular education students —

The issue is particularly acute in California where a controversy is brewing over bilingual education, and a proposed ballot initiative severely limiting native language instruction statewide may appear on the June 1998 ballot. The controversy is fueled in part by demographic changes in California where the number of LEP students has increased from 524,000 in 1985 to over 1,300,000 in 1996 and where there is an extreme shortage of trained bilingual teachers and other professionals.

125 Ed. Law Rep. [581] (July 9, 1998)

... But still they lead me back, to the long and winding road ...

From the Congressional Committee Report for the 1997 Reauthorization of IDEA

This authorization is viewed by the committee as an opportunity to review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality of education by:

1. Strengthening the role of parents;
2. Ensuring access to the general curriculum and reforms;
3. Focusing on teaching and learning while reducing unnecessary paperwork requirements;
4. Assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities;
5. Giving increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling;
6. Ensuring schools are safe and conducive to learning; and
7. Encouraging parents and educators to work out their differences by using nonadversarial means.

... But still they lead me back, to the long and winding road ...

The Problems with Twenty-First Century American Parents

[P]ush their children in ill-considered directions; blame for failures is placed in the most convenient, rather than the most deserving spot; the best interests of a child are ignored while the "adults" in the situation resort to legal action.

Austin Independent Sch. Dist. v. Robert M., Civil No. A-00-CA-523 JN (W.D. TX. July 23, 2001).

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... To the long and winding road...

Educating Exceptional Children: A Statistical Profile

In the last decade of the 20th Century, the number of students receiving special education grew by 30 percent, while school enrollment grew by 14 percent.

To support the excess cost of educating children with disabilities, in the initial IDEA legislation, Congress authorized funding up to 40 percent of the national average per pupil expenditure (APPE) multiplied by the number of special education students in each state. This would amount to an appropriation of $17 billion for the 2001 fiscal year. The actual amount appropriated was $6.3 billion, or 15 percent.

Educating Exceptional Children: A Statistical Profile, ERIC Clearinghouse on Disabilities and Gifted Education

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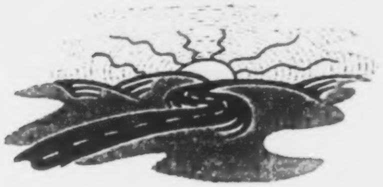
The Long and Winding Road
(on Discipline)



Presented by
Elena M. Gallegos
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.

The Long and Winding Road ...

Adopted by the Colony of New Haven, Connecticut in 1656

If any man have a stubborn, rebellious son, of sufficient age and understanding, namely 16 years of age and upward, which will not obey the voice of his father or the voice of his mother, and that when they have chastened him, will not yet hearken unto them, then shall his father and mother lay hold on him, and bring him to the magistrates assembled in court, and testify unto them that their son is stubborn and rebellious and will not obey their voice and their chastisement, but lives in sundry notorious crimes.

Such a son shall be put to DEATH.

Original Author: God (Deuteronomy 21:18)

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... That leads to your door, will never disappear ...

No Cessation of Services for a Student with Disabilities

When a student is expelled for behavior not related to the disability, *there cannot be a complete cessation of services*. The district must continue to provide services necessary to prevent significant regression.

S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).

... I've seen that road before ... It always leads me here ...

FAPE Required During Expulsion

A free appropriate public education is available to all children with disabilities residing in the state between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

IDEA Amendments of 1997
20 U.S.C. § 1412(a)(1)(A)

... The wild and windy night, that the rain washed away...

How IDEA '97 Affects the Ability of Schools to Maintain a Safe Environment for Learning (U.S. General Accounting Office Survey Results)

Responding principals generally viewed discipline policies for students receiving special education services favorably or neutrally. These policies are essentially a combination of IDEA federal regulations and local policy. Specifically, 76 percent of the principals rated their policies as having a positive or neutral effect on their schools' orderliness, and 74 percent rated similarly the effect on their schools' safety level. Eighty-seven percent of principals who are required to offer services to suspended students and 72 percent who are required to conduct manifestation determinations rated these policies as having a positive or neutral effect on their ability to properly discipline students receiving special education services. However, principals were more negative about local polices that prohibited actions not prohibited by IDEA. For example, of those principals who reported they are prohibited from suspending students receiving special education services for more than 10 school days over the course of a school year, 50 percent rated this policy as having a negative effect on their ability to properly discipline students.

Student Discipline and IDEA – Synthesis of GAO Report, by Joy Markowitz, Project Forum at NASDSE (April 2001).

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... Anyway, you'll never know the many ways I've tried ...

IDEA Protects Certain Not Yet Identified Students

A student who is not currently identified as eligible for special education and who has engaged in a violation of the Code of Conduct may assert any of the protections of the IDEA if the school "had knowledge" that the student was a child with a disability prior to the misbehavior.

20 USCA § 1415(k)(8)(A); 34 C.F.R. § 300.527.

... Anyway, you'll never know the many ways I've tried ...

Is Confinement a Related Service Under the IDEA?

For [Dale] all [the Elan School] provides is confinement. He was place in Elan not from any school in the defendant school district, but from jail. Elan is a jail substitute. An incorrigible truant and lawbreaker, Dale does better in every respect when he is in a custodial setting than when he lives at home.

Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307, 237 F.3d 813 (7th Cir. 2001); 33 IDELR 266.

... Anyway, you'll never know the many ways I've tried ...

Going Too Far

Supposing that the most effective educational program for Dale would be to take correspondence courses while confined in a prison, we do not think his mother would be arguing that the school district would have to pay the prison authorities for the expense of incarcerating him. But that is close to what she is arguing–that since confinement, among its other benefits to Dale, will make it easier for him to obtain an education, the school district is responsible for the cost of confinement. That, we conclude, goes too far.

Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307, 237 F.3d 813 (7th Cir. 2001); 33 IDELR 266.

... Let me know the way...

S.B.1196 "The Texas Seclusion Bill"

Seclusion Prohibited:

> "A behavior management technique in which a student is confined in a locked box, locked closet, or locked room that is designed solely to seclude a person, and contains less than 50 square feet of space." Texas Education Code, §37.0021(b)(2)

Time-Out Permitted Subject to Guidelines:

> "A behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting that is not locked and from which the student is not physically prevented from leaving." Texas Education Code, §37.0021(b)(3).

Physical Restraint Permitted Subject to Guidelines:

> "The use of physical force or a mechanical device to restrict the free movement of all or a portion of a student's body." Texas Education Code, §37.0021(b)(1).

... Let me know the way...

Bill Pending in Congress:
No Child Left Behind Act of 2001

Sec. 5155. Discipline of Children with Disabilities.

(a) AUTHORITY OF SCHOOL PERSONNEL – Each State receiving funds under this Act shall require each local educational agency to have in effect a policy under which school personnel of such agency may discipline (including expel or suspend) a child with a disablity who–

(1) Carries or possesses a weapon ...;

(2) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school ...; or

(3) Commits an aggravated assault or battery ...

THE PERSONAL LIVES AND PROFESSIONAL RESPONSIBILITIES OF EDUCATORS: OFF-DUTY CONDUCT AS GROUNDS FOR ADVERSE EMPLOYMENT ACTIONS

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I. INTRODUCTION

> "[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."
> -*Ambach v. Norwich*, 441 U.S. 68, 78-79 (1979).

Traditionally, educators have been held to a higher standard of conduct than those who do not work with students. Thus, what they do off-duty has sometimes been used by employers as grounds for adverse employment actions. The general principle is that the employer must demonstrate a "nexus" between the off-the-job behavior and on-the-job performance. But the range of personal conduct for which there may be employment consequences is substantial, and the decisions are often difficult for the educational employer, because of both complexity and sensitivity.

A review of case law suggests that over the years courts have come to be somewhat more protective of the personal lives of educators. The presentation of this "legal odyssey" will focus on this important area of employment rights and responsibilities in the education community.

This session will explore the legal principles applied by state and federal courts in resolving employment disputes arising over off-duty conduct of educators. Cases turning on issues of freedom of expression and freedom of association are not included.

II. GENERAL PRINCIPLES

"In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform." *Woo v. Putnam County Board of Education*, 504 S.E.2d 644, 647 (W. Va. 1998).

What might otherwise be private becomes a concern of school officials in either of two circumstances; (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher, or, (2) if, without contribution on the part of the school officials, the conduct becomes the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. *Golden v. Board of Education of County of Harrison*, 285 S.E.2d 665 (W. Va. 1982); *Jerry v. Board of Education of City School District of Syracuse*, 324 N.E.2d 106 (N.Y. 1974).

"In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the part involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers." *Morrison v. State Board of Education*, 461 P.2d 375, 386 (Cal. 1969); *See also, Erb v. Iowa State Board of Public Instruction*, 216 N.W. 339 (Iowa 1974).

III. CONDUCT AND CONSEQUENCES

A. Inappropriate Relationship with Student

1. Employer Prevails

•*Clark v. Ann Arbor School District*, 344 N.W.2d 48 (Mich. Ct. App. 1983) (upheld dismissal of tenured female teacher for inappropriate relationships with male students; even absent evidence of sexual misconduct, teacher may be discharged on evidence of potential misconduct or of an unprofessional relationship with a student).

•*Barcheski v. Board of Education of Grand Rapids Public Schools*, 412 N.W.2d 296 (Mich. Ct. App. 1987) (upheld dismissal of tenured teacher for cause; teacher invited students to party where they crank beer and smoked marijuana).

•*Morris v. Clarksville-Montgomery County Consolidated Board of Education*, 867 S.W.2d 324 (Tenn. Ct. App. 1993) (upheld dismissal of tenured teacher for unprofessional conduct; teacher who allows student to sleep with and engage in intimate activity compromises his ability to teach).

•*Hamm v. Poplar Bluff R-1 School District*, 955 S.W.2d 27 (Mo. Ct. App. 1997) (upheld dismissal of teacher during contract year for immoral conduct; having girl in his house at night and lying to police about it did not demonstrate morals required of teacher).

•*Parker v. Board of Education of Byron Center Public Schools*, 582 N.W.2d 859 (Mich. Ct. App. 1998) (upheld dismissal of tenured teacher; sexual relationship with student at her home sixteen years prior to charges being brought was not too remote to support dismissal).

- *Andrews v. Independent School District No. 57*, 12 P.3d 491 (Okla. Ct. App. 2000) (upheld termination of career teacher for moral turpitude; romantic relationship between teacher and student, even absent evidence of sexual relationship, is contrary to good morals).

- *Baltrip v. Norris*, 23 S.W.3d 336 (Tenn. Ct. App. 2000) (upheld dismissal of tenured teacher; guilty plea to charge arising out of an uninvited and unwelcome touching of student at his house cannot be reconciled with role as teacher and clearly falls within the definition of unprofessional conduct).

2. Employee prevails

B. Immorality/Bad Judgment

1. Employer prevails

- *Gover v. Stovall*, 35 S.W.2d 24 (Ky. 1931) (upheld dismissal during school year; male teacher spending time in dark school building with three girls set bad example and raised suspicions of immorality).

- *Horosko v. School District of Mount Pleasant Township*, 6 A.2d 866 (Pa. 1939) (upheld dismissal for incompetence and immorality; teacher worked in husband's restaurant that served beer and allowed gambling, which showed lack of fitness, offended morals of community, and was a bad example).

2. Employee prevails

- *Jarvella v. Willoughby-Eastlake City School District Board of Education*, 233 N.E.2d 143 (Ohio Ct. App. 1967) (overturned dismissal during school year for immorality; teacher's private letter to his former male student, although vulgar and offensive, was constitutionally protected and not shown to be damaging to welfare of school).

- *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973) (overturned dismissal of nontenured teacher for conduct unbecoming a teacher; teacher had her son's friend as houseguest; board's inference of misconduct was arbitrary and capricious because it lacked any basis in fact, and thus was a violation of substantive due process).

C. Sexual Misconduct

1. Employer prevails

- *Board of Education of the El Monte School Distict of Los Angeles County v. Calderon*, 110 Cal. Rptr. 916 (Cal. Ct. App. 1973) (upheld dismissal of probationary teacher during school year for immoral conduct; teacher arrested for oral copulation with another man, but acquitted; however, acquittal is not proof that offense did not occur, thus board has discretion as to whether or not to retain employee).

- *Pettitt v. State Board of Education*, 513 P.2d 889 (Cal. 1973) (upheld revocation of teaching credential on grounds of unfitness to teach and moral turpitude; teacher had engaged in sex with men other than her husband; she lacked minimum degree of discretion and regard for propriety expected of teacher and would be unable to set proper example for pupils).

- *Tomerlin v. Dade County School Board*, 318 So. 2d 159 (Fla. Dist. Ct. App. 1975) (upheld dismissal for immoral conduct; teacher had sexually abused his stepdaughter, but argued unsuccessfully that statute was vague and that act was unrelated to his job; any reasonable person should know such conduct was prohibited and that his action made him a danger to children and unfit to teach).

- *Yanzick v. School District No. 23, Lake County*, 641 P.2d 431 (Mont. 1982) (upheld dismissal of tenured teacher for lack of fitness; teacher cohabited with fellow teacher, which became publicly known; conduct must directly affect teaching performance, and teacher admitted conduct had adverse effect on his students).

- *Lang v. Lee*, 639 S.W.2d 111 (Mo. Ct. App. 1982) (upheld dismissal of tenured teacher for molesting children; teacher argued that dismissal proceedings prior to criminal trial violated his right to due process, but civil proceedings are not required to be withheld pending the result of criminal prosecution; teacher had daily contact with young people, and board had strong interest in dealing with the matter expeditiously).

- *Ross v. Springfield School District*, 691 P.2d 509 (Or. Ct. App. 1984) (upheld dismissal of permanent teacher for gross unfitness and immorality; teacher was observed engaging in homosexual activity in arcade booth; such conduct violates moral standards of school and community, and his ability to function as teacher was severely impaired).

- *Lile v. Hancock Place School District*, 701 S.W.2d 500 (Mo. Ct. App. 1985) (upheld dismissal of tenured teacher for immoral conduct and unfitness to teach; teacher was charged for criminal abuse of two young girls who lived in his house with their mother; board had legitimate interest in protecting community from harm, and Constitution did not extend right to privacy to embrace any and all activities that occur in the home).

- *Kelly v. City of Meriden*, 120 F. Supp. 2d 191 (D. Conn. 2000) (upheld discharge of school social worker for poor judgment and unprofessional conduct; dismissal for living in intimate relationship with non-custodial father of children to who she provided social services did not violate constitutional right to freedom of association).

- *Morrill v. New Hampshire State Board of Education*, 765 A.2d 699 (N.H. 2001) (upheld revocation of certificate for lack of good moral character; teacher had inappropriate contact with young girl at his church; there is no requirement that classroom behavior be sole basis for determining fitness to teach, and board may terminate a teacher for conduct outside of school if there is sufficient nexus between conduct and board's interest in protecting community from harm; evidence showed that teachers actions were related to his fitness and ability to teach.)

2. Employee prevails

- *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339 (Iowa 1974) (overturned revocation of certificate on grounds of moral turpitude; although teacher had affair with another teacher, conduct must adversely affect the teacher-student relationship for revocation to be appropriate, and board made no such findings).

- *Thompson v. Southwest School District*, 483 F. Supp. 1170 (W.D. Mo. 1980) (enjoined suspension and dismissal for immoral conduct; teacher had cohabited with future husband; no evidence that conduct rendered her unfit to teach; must be nexus between conduct and educational system).

- *Garcia v. State Board of Education*, 694 P.2d 1371 (N.M. Ct. App. 1984) (overturned denial of re-certification; teacher found guilty of criminal conduct with a child received probation and deferred sentence, and case was dismissed after teacher was rehabilitated; although sexual misconduct with a minor relates directly to teaching profession, teacher met burden of showing that he was rehabilitated and fit to be in classroom).

•*Sherburne v. School Board of Suwannee County*, 455 So. 2d 1057 (Fla. Dist. Ct. App. 1984) (overturned dismissal of nontenured teacher for lack of moral character; teacher cohabited with man to whom she was not married; board did not show good cause for dismissal; although some may think sex outside of marriage is immoral, the board did not show how behavior had an effect on students or her effectiveness to teach).

•*LaSota v. Town of Topsfield*, 979 F. Supp. 45 (D. Mass. 1997) (nontenured teacher whose contract was not renewed had constitutional right to cohabit and have a child with person whom she intended to marry, free from government interference).

•*Bertolini v. City School District Board of Education*, 744 N.E.2d 1245 (Ohio Ct. App. 2000) (overturned termination of administrator's contract; adulterous affair with colleague without evidence to establish that it created hostility in the school community or that it had a serious impact on professional duties is not valid reason for dismissal; nor should rationale that affair made him "not the type of role model parents want" be used as standard).

D. Pregnancy out of Wedlock

1. Employer Prevails

•*Brown v. Bathke*, 416 F. Supp. 1194 (D. Neb. 1976) (reversed on procedural grounds, 566 F.2d 588 (8th Cir. 1977) (upheld dismissal of probationary teacher during school year for being unwed and pregnant; rational connection between teacher's unwed pregnancy and board's interest in conserving marital values).

2. Employee Prevails

•*Avery v. Homewood City Board of Education*, 674 F.2d 337 (5th Cir. 1982) (overturned dismissal of unwed pregnant teacher during school year; board offered no support for assertion that unwed parenthood is per se proof of immorality and that a parent of an illegitimate child is an unfit role model, thus dismissal was violation of Equal Protection Clause).

•*Ponton v. Newport News School Board*, 632 F. Supp. 1056 (E.D. Va. 1986) (forced leave of absence impermissible; both Constitution and Title VII prohibit discrimination against unwed pregnant teacher).

•*Eckmann v. Board of Education of Hawthorn School District No. 17*, 636 F. Supp. 1214 (N.D. Ill. 1986) (dismissal of teacher for decision to conceive and raise her child out of wedlock prohibited by substantive due process).

•*Cameron v. Board of Education of Hillsboro, Ohio, City School District*, 795 F. Supp. 228 (S.D. Ohio 1991) (denial of summary judgment for board in case involving dismissal of unwed teacher who became pregnant by artificial insemination; Due Process, Equal Protection, and Title VII protect teacher from dismissal for unwed pregnancy).

E. Sexual Orientation

1. Employer prevails

•*In re Grossman*, 316 A.2d 39 (N.J. Super. Ct. App. Div. 1974) (upheld dismissal of tenured teacher for just cause; male teacher had sex change operation and wanted to continue teaching as a female; board found there would be emotional harm to students and therefore unfitness to teach).

•*Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340 (Wash. 1977) (upheld discharge of high school teacher during school year on grounds of immorality; public knowledge of homosexual activities impaired his ability to perform his duties, and retention would have created danger of expression of approval and imitation of homosexual activity).

2. Employee prevails

•*Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969) (overturned revocation of teaching certificate on grounds of immorality, unprofessional conduct, and moral turpitude; lack of evidence to show that isolated instances of homosexual conduct with fellow teacher established unfitness to teach).

•*National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) (portion of state stature permitting teacher to be fired for public homosexual activity constitutionally permissible; portion providing for punishment for mere advocacy of homosexual activity was unconstitutionally broad).

•*Glover v. Williamsburg Local School District Board of Education*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (overturned nonrenewal of teacher's contract; evidence showed discrimination on basis of sexual orientation, and no rational basis for that action).

F. Drug Use/Possession/Trafficking

1. Employer Prevails

•*Dominy v. Mays*, 257 S.E.2d 317 (Ga. Ct. App. 1979) (upheld dismissal of tenured teacher; possession of dangerous drugs is evidence from which immorality may be inferred).

•*Adams v. State Professional Practices Council*, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981) (upheld revocation of teaching certificates; possession of 52 marijuana plants constituted moral turpitude; teachers held to a higher moral standard).

•*Chicago Board of Education v. Payne*, 430 N.E.2d 310 (Ill. App. Ct. 1981) (upheld dismissal of tenured teacher for conduct unbecoming a teacher; teacher's possession of small quantity of marijuana outside of school environment was sufficient cause for dismissal; clear nexus between teacher's conduct and his fitness to teach).

•*Dupree v. School Committee of Boston*, 446 N.E.2d 1099 (Mass. App. Ct. 1983) (upheld suspension of nontenured teacher; school committee may consider indictment for possession of cocaine to be indictment for misconduct in office).

•*Deshields v. Chester Upland School District, Delaware County*, 505 A.2d 1080 (Pa. Commw. Ct. 1986) (upheld dismissal of custodian for improper conduct; arrested for possession of marijuana; charges dropped because marijuana illegally seized, but school could use that evidence).

•*Board of Education of Hopkins County v. Wood*, 717 S.W.2d 837 (Ky. 1986) (upheld dismissal of tenured teacher for immoral conduct; teachers smoked marijuana with two students in teachers' apartment; there was a nexus between off-duty conduct involving students and teachers' occupation).

•*Jefferson County School District v. Fair Dismissal Appeals Board and Carol Kari*, 793 P.2d 888 (Or. Ct. App. 1990) (upheld dismissal of permanent teacher in anti-drug program for immorality and neglect of duty; her husband had been using their home to grow and sell marijuana; she argued that she feared her husband and was trying to keep home together, but court found that her duty was to preserve her role as anti-drug teacher).

•*Dubuclet v. Home Insurance Co.*, 660 So. 2d 67 (La. Ct. App. 1995) (upheld dismissal of teacher for immorality; although criminal case for possession of marijuana and cocaine was dismissed, evidence at the board hearing supported finding that he had possessed the drugs).

•*Gedney v. Board of Education of the Town of Groton*, 703 A.2d 804 (Conn. App. Ct. 1997) (upheld dismissal of tenured teacher for moral misconduct because of possession of cocaine and drug paraphernalia; he argued unsuccessfully that his addiction was a disability and that dismissal violated state and federal law; not "otherwise qualified" because of arrest for felonious activity).

•*Woo v. Putnam County Board of Education*, 504 S.E.2d 644 (W. Va. 1998) (upheld dismissal of teacher on grounds of immorality and intemperance; public notoriety resulting from teacher's admission that he had smoked marijuana at home was rational nexus between off-duty conduct and teaching duties).

2. Employee Prevails

•*Board of Trustees of the Santa Maria Joint Union High School District v. Judge*, 123 Cal. Rptr. 830 (Cal. Ct. App. 1975) (overturned dismissal of tenured teacher; "curious" teacher found marijuana plant, brought it home, and was later arrested and convicted; no indication of unfitness to teach, no students involved, no moral turpitude).

•*Warren County School District of Warren County v. Carlson*, 418 A.2d 810 (Pa. Commw. Ct. 1980) (overturned dismissal during school year for immorality; plea of *nolo contendere* in criminal prosecution not substantial evidence of possession of marijuana).

•*Baker School Board of Marion County*, 450 So. 2d 1194 (Fla. Dist. Ct. App. 1984) (overturned dismissal of teacher for immorality or misconduct in office; although possession of marijuana constitutes "immorality," evidence did not support board's finding that teacher possessed marijuana at his place of business).

•*Rogliano v. Fayette County Board of Education*, 347 S.E.2d 220 (W. Va. 1986) (overturned dismissal of permanent substitute teacher for immorality; misdemeanor possession of marijuana was not shown to impair ability to teach and nor to cause widespread adverse public reaction).

G. Alcohol Abuse

1. Employer prevails

•*Watson v. State Board of Education*, 99 Cal. Rptr. 468 (Cal. Ct. App. 1972) (upheld denial of application of general secondary life diploma; criminal convictions for abuse of alcohol in public demonstrated unfitness to teach).

•*Vukadinovich v. Board of School Trustees of Michigan City Area Schools*, 978 F.2d 403 (7th Cir. 1992) (upheld cancellation of teacher's contract for alcohol-related legal problems).

2. Employee prevails

•*Clark v. School Board of Lake County*, 596 So.2d 735 (Fla. Dist. Ct. App. 1992) (overturned dismissal of teacher with continuing contract on grounds of incompetency, immorality, and misconduct; although atypical alcohol-influenced acts occurring during summer, when she was not on duty, were inappropriate and abnormal, they did not constitute incompetency; nor were charge of abuse and *nolo contendere* plea conclusive grounds for dismissal).

•*In re Termination of Kibbe*, 996 P.2d 419 (N.M. 1999) (overturned dismissal of tenured teacher for DUI arrest; arrest and driving under influence did not involve moral turpitude, nor was there any relationship to competence as school teacher).

H. Criminal Misconduct

1. Employer prevails

•*Bay v. State Board of Education*, 378 P.2d 558 (Or. 1963) (upheld denial of teaching certificate; conviction for grand larceny indicates lack of moral character, which is a prerequisite for teachers).

•*Williams v. School District No. 40 of Gila County*, 417 P.2d 376 (Ariz. Ct. App. 1966) (upheld dismissal of tenured teacher; altercation at bar involving weapons was just cause for dismissal).

•*Lesley v. Oxford Area School District*, 420 A.2d 764 (Pa. Commw. Ct. 1980) (upheld dismissal of teacher for immorality; shoplifting offends the community and was bad example to youth).

•*Perryman v. School Committee of Boston*, 458 N.E.2d 748 (Mass. App. Ct. 1983) (upheld suspension of tenured teachers for misconduct in office; indictment for welfare fraud alleges conduct directly contradicting most fundamental values society expects teachers to inculcate in children).

•*Kenai Peninsula Borough Board of Education v. Brown*, 691 P.2d 1034 (Alaska 1984) (upheld dismissal of tenured teacher for moral turpitude; convicted for diverting electricity from local power company, and act of theft involved moral turpitude).

•*Ellis v. Ambach*, 508 N.Y.S.2d 624 (N.Y. App. Div. 1986) (upheld dismissal of tenured teacher for conduct unbecoming a teacher; teacher plead guilty to charge of negligent homicide in connection with a traffic accident; gross deviation of standard of care expected of reasonable person, and teacher could not longer serve as role model).

•*Matter of Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987) (upheld dismissal of tenured teacher for immoral conduct and conduct unbecoming a teacher; evidence supported board's conclusion that theft from corporation owned by teacher and two colleagues would result in faculty disorder and an unsatisfactory learning environment.)

•*Startzel v. Commonwealth of Pennsylvania, Department of Education*, 562 A.2d 1005 (Pa. Commw. Ct. 1989) (upheld revocation of teaching certificate; mail fraud is crime involving moral turpitude).

•*Stelzer v. State Board of Education*, 595 N.E.2d 489 (Ohio Ct. App. 1991) (upheld revocation of teaching certificate; welfare fraud is conduct unbecoming a teacher).

•*Board of Directors of Lawton-Bronson Community School District v. Davies*, 489 N.W.2d 19 (Iowa 1992) (upheld dismissal of teacher during school year; evidence of repeated instances of shoplifting, even taking medical condition into account, was just cause for dismissal; teacher must be seen as good role model).

•*Hainline v. Bond*, 824 P.2d 959 (Kan. 1992) (upheld revocation of teaching certificate for immorality; nexus between burglary and theft and job performance; presumption that felonious conduct is related to fitness to teach).

•*In re Thomas*, 926 S.W.2d 163 (Mo. Ct. App. 1996) (upheld dismissal of tenured teacher for immoral conduct; shooting estranged husband's girlfriend constituted immoral conduct and rendered her unfit to teach; board did not violate due process by proceeding with the dismissal prior to resolution of criminal charges).

•*Satterfield v. Grand Rapids Public Schools*, 556 N.W.2d 888 (Mich. Ct. App. 1996) (upheld dismissal of tenured teacher; evidence showed that conviction for embezzlement at outside workplace would have adverse effect on school).

•*Kinniry v. Abington School District*, 673 A.2d 429 (Pa. Commw. Ct. 1996) (upheld dismissal of teacher during school year on basis of immorality; trafficking in counterfeit goods per se offensive to the morals of the community and a bad example to youth).

•*Barringer v. Caldwell County Board of Education*, 473 S.E.2d 435 (N.C. Ct. App. 1996) (upheld dismissal of career teacher for immorality; early-morning incident with firearms at pool hall was conduct that by common judgment reflected upon teacher's fitness to teach).

•*Panzella v. River Trails School District 26, Cook County*, 729 N.E.2d 954 (Ill. App. Ct. 2000) (upheld dismissal of tenured teacher for abusing his child; statute prohibiting board's employment of teacher convicted of abuse requires dismissal even prior to exhaustion of appeals).

•*Purvis v. Marion County School Board*, 766 So. 2d 492 (Fla. Dist. Ct. App. 2000) (upheld termination of continuing contract teacher and coach for misconduct in office; altercation with fiancé outside nightclub and resisting an officer impaired effectiveness; school must be concerned about behaviors a teacher exhibits as a role model, even away from school grounds).

2. Employee prevails

•*Golden v. Board of Education of County of Harrison*, 285 S.E.2d 665 (W. Va. 1981) (overturned dismissal of guidance counselor during school year on grounds of immorality; board did not prove rational nexus between arrest and *nolo contendere* plea to misdemeanor charge of shoplifting and fitness to teach).

•*Hoagland v. Mount Vernon School District No. 320, Skagit County*, 623 P.2d 1156 (Wash. 1981) (overturned dismissal during school year of teacher convicted of grand larceny; remanded for hearing on question of whether conviction and conduct made him unfit to teach and thus constituted sufficient cause for dismissal).

•*McNeill v. Pinellas County School Board*, 678 So. 2d 476 (Fla. Dist. Ct. App. 1996) (overturned dismissal for immorality; teacher did touch undercover officer in sexually suggestive manner, but lack of evidence of impaired effectiveness as teacher).

I. Other

1. Employer prevails

•*McClelland v. Paris Public Schools*, 742 S.W.2d 907 (Ark. 1988) (upheld dismissal of teacher for moving outside school district; residency policy satisfied rational basis test).

2. Employee prevails

•*Littlejohn v. Rose*; 768 F.2d 765 (6th Cir. 1985) (decision by school officials to not reoffer employment to nontenured teacher would violate teacher's constitutional right to privacy if based on teacher's involvement in divorce).

IV. Conclusion

Educators do in fact have private lives, but they also have professional responsibilities. When educational employers consider their employees off-duty conduct as potential grounds for adverse employment actions, they should be certain that they can demonstrate that the conduct in question does have a detrimental impact on the operation of the school and the welfare of the students. Establishing this nexus will insure that both the rights of employees and the interests of students will be protected.

CORPORAL PUNISHMENT AND SUBSTANTIVE DUE PROCESS: RECENT RARITIES SIGNAL FAVORABLE CHANGE

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Corporal Punishment and Substantive Due Process: Recent Rarities Signal Favorable Change

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Durante Neal has an artificial left eye as a result of a school incident some five years ago. After that incident during which he was struck by a teacher, Neal sued his school district claiming a violation of his constitutional right to substantive due process. Neal's case follows a long line of cases that relate to Ingraham v. Wright,[1] the only Supreme Court full decision to date that has dealt directly with a student's claims of denial of constitutional rights resulting from disciplinary corporal punishment of a student in a public school.[2] This paper will utilize a recent Eleventh Circuit Court of Appeals decision, Neal v. Fulton County Bd. of Educ.,[3] as the starting point for illustrating a plaintiff's claims and a defendant's responses in a case centering on substantive due process arising from severe corporal punishment. Then this paper will explore the development of some judicial decisions within the last decade that deal with substantive due process claims arising out of instances of corporal punishment. As such, this paper will constitute an expansion and update of my prior work on corporal punishment.[4]

Facts of Neal's Incident and Case [5]

Durante Neal, age 14, was a freshman and member of the varsity football team of Tri-Cities High School in East Point, Georgia. On May 30, 1996, another member of the football team, Royonte Griffin, slapped Neal in the face during football practice. Neal reported the incident to Tommy Ector, a high school teacher and assistant coach, who told Neal, "You need to learn to handle your own business." Neal subsequently took a weight lock (a metal object used to secure weights on dumbbell bars) from the coaches' office and put it in his gym bag. After practice was over, Griffin again approached Neal. Neal then took the weight lock and hit Griffin in the head with it, cutting Griffin's scalp. Neal put the weight lock back into his bag. The two boys then began to fight.

Ector and Principal Herschel Robinson were in the immediate area. Neither Ector nor Robinson stopped the fight. Ector began dumping out the contents of Neal's gym bag, shouting repeatedly, "What did you hit him with? If you hit him with it, I am going to hit you with it." Ector, in the presence of Robinson, took the weight lock and hit Neal with it in the left eye. As a result, Neal's eye "was knocked completely out of its socket," destroying and dismembering the eye. The eye was "hanging out of his head" and Neal was in "severe pain." Nevertheless, neither Ector nor Robinson stopped the fight. Subsequently, the eye "had to be surgically removed."

On May 22, 1998, Neal and his parents filed suit in the United States District Court, Northern District of Georgia against the defendants (the Fulton County Board of Education; Superintendent Stephen Dolinger, Principal Herschel Robinson, and Coach Tommy Ector, Individually and in their official capacities; and Royonte Griffin) pursuant to 42 U.S.C. 1983. Neal alleged excessive use of force on him and inadequate training of Ector by the school district. In short, Neal claimed that Ector's actions were so grossly excessive as to be shocking to the conscience, thereby implicating Neal's liberty interest and violating Neal's Fourteenth Amendment substantive due process rights.

Appellate Proceedings: The Eleventh Circuit's Decision

The appellate court reviewed de novo the district court's decision to grant the defendants' motion to dismiss Neal's claims. In doing so it accepted as true the factual allegations in Neal's complaint and construed the alleged facts in a light favorable to Neal. The court recognized that a motion to dismiss may be granted only when the defendants demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[6]

The appellate court addressed three questions to arrive at its decision: (1) Did Coach Ector's conduct constitute corporal punishment? (2) Did the Ingraham decision of the former Fifth Circuit "dictate the outcome" of Neal? (3) Did Neal actually state a cause of action under the Fourteenth Amendment's Due Process Clause? The Eleventh Circuit answered those questions in the order asked: Yes; No; and Yes. For our purposes here let us look only at the court's respone to the last question.

Question 3: Did Neal actually state a cause of action under the Due Process clause?

Citing Collins v. City of Harker Heights,[7] the court recognized that the Supreme Court has been "reluctant" to expand the substance due process rights of plaintiffs.[8] The court also recognized that the Supreme Court and the Eleventh Circuit had both said that the Fourteenth Amendment ought not to be "a font of tort law."[9] Nevertheless, the Eleventh Circuit went on to say that "in certain circumstances" (emphasis by the court) a plaintiff may assert a cause of action for violation of substantive due process rights under the Fourteenth Amendment.

The court, citing the Supreme Court in County of Sacramento, recognized that a violation of substantive due process rights occurs when the government's action is arbitrary or shocking to the conscience.[10] Furthermore, the "concept of conscience shocking" does not duplicate state tort law.[11] On the other hand, the court also recognized that when school officials use reasonable force within the limits of the common law privilege of corporal punishment, there is no violation of the Fourteenth Amendment. With these two different conditions in mind, the court noted that "almost all" of the other Courts of Appeals have ruled that a student suffering excessive discipliary corporal punishment may indeed state a claim of substantive due process rights. As the Fourth Circuit famously put it when it established its standard for determining when a violation of substantive due process occurs, "[A violation occurred when the force of the punishment] amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[12] At this point the Eleventh Circuit accepted the rationale of these courts rather than the rationale of its parent Fifth Circuit.[13]

Following the lead of the other courts, the Eleventh Circuit established its own test, one that is similar to the other courts' tests in regard to severe corporal punishment: The Eleventh Circuit stated that "at a minimum, the plaintiff must allege facts demonstrating (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of bodily injury."[14] By examining the "totality of the circumstances," the appellate court ruled that Neal did state a cause of action under Section 1983. The Eleventh Circuit, therefore, vacated the district court's decision to dismiss Neal's complaint and remanded the case for further proceedings consistent with its decision.

Commentary

Three significant effects of the Neal appellate decision to reverse the district court's dismissal of Neal's complaints against the Fulton County Board of Education are significant and now evident. Two of these effects became apparent immediately and one became apparent slightly less than two months after the decision was rendered. First, Neal's case returned to the district court level where, as I write, the parties are now engaged in discovery so as to present their positions for adjudication.

Second, the appellate decision separated the Eleventh Circuit from its roots in the Fifth Circuit, thereby bringing the Eleventh Circuit in line with the other circuits of the country. Neal has rejected what one critic of the Fifth Circuit has called the "irrationality" of *Ingraham* and its progeny.[15]

Third, most significantly and most unexpectedly the appellate decision in *Neal* has had a quick and direct effect on the new Fifth Circuit itself. In *Moore v. Willis Independent School District*,[16] a case dealing with the corporal punishment[17] of 14-year old Aaron Moore, the Fifth Circuit affirmed the district court's decision in favor of the school district.

What was significant and unexpected in *Moore* was Judge Weiner's accompanying opinion, a "specially concurring" opinion to go along with his opinion written for the court. That move by Weiner was a rarity. The term "specially concur" does not even appear in Black's Law Dictionary, Fifth Edition. It is to Weiner's specially concurring opinion in *Moore* that we now must turn because it is what was triggered in time and content by the Eleventh Circuit's decision in *Neal*, as Weiner himself indicated.

Judge Weiner recognized and admitted upon reading *Neal* that the Fifth Circuit is now totally "isolated" in its position regarding claims for denial of substantive due process in corporal punishment cases.[18] Weiner noted that the isolation occurs in that other federal circuits have rejected the Fifth Circuit's fundamental position, as it established in *Ingraham*. That position is that "as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment...."[19]

Weiner, in his concurrence, pointed out that the Supreme Court did not rule that the availability of a state remedy precluded the availability of a substantive due process claim. "It [the Supreme Court] did *not* proclaim that an adequate remedy provided by state law or procedure constitutes a *per se* bar to a student's ability to state a substantive due process claim."[20] (emphasis in original). Weiner's point is significant because in a 1990 Supreme Court case dealing with the claims of a mental patient against the State of Florida the Supreme Court held that the "Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the 'fairness of the procedures used to implement them.' *Daniels v. Williams*, 474 U.S., at 331. A plaintiff...may invoke a §1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights."[21]

Weiner went on to recognize that, even given the 1990 position of the Supreme Court, the Fifth Circuit has "never closely examined the adequacy of those state remedies, instead simply dismissing §1983 claims against school districts and individual defendants alike, regardless of whether they might be immune from suit."[22] Weiner admitted that in general school districts are immune from tort claims. Then he admitted that there is doubt "whether the state provides a remedy to injured students at all, much less an adequate one."[23]

Weiner "suggested" that the time has arrived for his circuit to sit "en banc to re-examine its position."[24] Weiner's suggestion thus creates a crack in the formerly solid, strong, and secure Fifth Circuit wall. This crack, I believe, is a critical one because it was evoked by the courageous position of the Fifth Circuit's offspring, the Eleventh Circuit.

Despite Judge Weiner's efforts in his concurring opinion, temptation exists to criticize Judge Weiner for not taking a stand against corporal punishment itself. After all, the data on corporal punishment have changed significantly in the last quarter-century. In his majority opinion for the Supreme Court's decision in Ingraham in 1977, Justice Powell noted, "Only two states, Massachusetts and New Jersey, have prohibited corporal punishment in their public schools."[25] According to current data, 27 states, several large cities, and Washington, D.C. now ban corporal punishment. Moreover, the number of reported paddlings of students has decreased from 1.4 million in the 1979-80 school year to 470,000 in 1993-94 to 365,000 in 1997-98.[26] (It is fair to point out that in the 1997-98 school year ten states, including the three that comprise the fifth circuit [Louisiana, Mississippi, and Texas], accounted for 90% of the incidents nationwide.[27])

In addition, it is possible to criticize Judge Weiner for not citing or otherwise utilizing Rosenberg's excellent and detailed 1990 article, positing the "irrationality" of the decisions of the Fifth Circuit regarding substantive due process.[28] In her 1990 article specifically devoted to the Fifth Circuit, Professor Rosenberg noted that state laws authorize only the use of reasonable force on students. She argued correctly, I believe, that fifth-circuit states should not then "insulate its overzealous agents from suit in the federal courts by creating state remedies" for dealing with corporal punishment.[29] She incisively pointed out that "the Fifth Circuit, without analysis, has steadfastly adhered to the view that state remedies in some way preclude a Section 1983 claim...."[30] (emphasis added).

Furthermore, Weiner is subject to criticism because it is apparent that he was not able to convince even one colleague to join him in his specially concurring opinion. Nor was Weiner willing to insist that one of his colleagues write the opinion for the court so he could dissent, thereby forthrightly supporting Moore's claim regarding the denial of substantive due process. It is not clear why Weiner shifted the burden of responsibility for examining the availability of state remedies from individual judges or panels of judges to the full, en banc Fifth Circuit.

In spite of my overall criticism of Weiner, I am grateful for the crack in the Fifth Circuit's wall that was created by him. A change in the Fifth Circuit will be desirable and acceptable even if it is based on weak grounds. Better a change for weak reasons than no positive change at all. If the Fifth Circuit's wall subsequently falls due to Weiner's Joshua-like trumpet call,[31] other benefits may occur.
We need not fear nor expect an overnight revolution in the law on corporal punishment. The 23 states that now permit corporal punishment do so because their legislatures reflect the cultural approach of their constituents to the rearing and educating of their children. A change in culture is a slow process.

Furthermore, judging from prior court decisions concerned with holding a school district liable in matters related to student behaviors, the standard to be applied in any future reform will be a high one to meet. The two part standard of the Eleventh Circuit quoted earlier constitutes a deliberately high bar that will defeat many student plaintiffs. Perhaps unnecessarily, the Eleventh Circuit immediately went on to indicate explicitly that it did not expect a great response to the change it had made in the law. In reflecting on the "test" it had established, the court said:

> The test we adopt today will, we think, properly ensure that students will be able to state a claim only where the alleged corporal punishment truly reflects the kind of egregious official abuse of force that would violate substantive due process protection in other, non-school contexts. We do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment. [emphasis in the original].[32]

We must accept the fact that most federal courts have finally recognized the need to protect students via constitutional provision rather than via tort law in severe instances of corporal punishment. We must also accept the fact the standards established for such protection may be too high for many student plaintiffs to meet.

Additionally, we must admit that it is not clear, nor can it ever be clear, to what extent the availability of constitutional protection has lowered the number of student victims over the past two decades. Even if there is no causal relationship between court decisions and the reduction of corporal punishment, it is true that the number of students struck (paddled) has decreased during the two decades from 1980 to 1998, the same time period during which most jurisdictions decided that constitutional protection was appropriate. (Note the dates in the decisions cited in endnotes 46 and 47.) Of course, the decrease in corporal punishment may not be attributable to the court decisions but to the rise of public concern,[33] which is the cause for the court decisions in the first place. After all, it is roughly in this same time period from 1980 to today that the number of states banning corporal punishment in public schools has risen from 2 to 27. It is also the period during which world-wide support appeared for the United Nations Convention on the Rights of the Child, a document with provisions for prohibiting the corporal punishment of children. As of the year 2000, 191 nations have ratified that Convention. (The United States has not done so at this time.[34])

In any case, it is apparent that there is an interdependent relation between the official banning of corporal punishment, the reduction of students paddled for disciplinary reasons, and court decisions giving constitutional protection to students. Court decisions do strengthen and support any popular movement against corporal punishment, whether that punishment is severe or not severe.

In conclusion, I am optimistic that with the combined appearance of Neal and Moore the courts will move forward in protecting students, prodding at times and following at times the state legislators, local board of education members, and educators who recognize the continue need to value the constitutional and humane rights of students. Some change has already occurred in the law and in the use of corporal punishment. It is a significant change, albeit a slow and tardy one, and it will and should continue.

ENDNOTES

1. 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed. 2d 711 (1977).

2. The only other Supreme Court decision on corporal punishment is Baker v.Owen, 435 U.S. 907 (1975). In Baker the Court just summarily affirmed a district court opinion that held that a parent's approval was not necessary before a school could administer reasonable corporal punishment pursuant to its regular school policy. Thus, no violation of the Fourteenth Amendment occurred. See the district court's opinion at 395 F. Supp. 294 (M.D.N.C.).

3. 229 F.3d 1069 [148 Ed.Law Rep.[86]] (11th Cir. 2000).

4. R.T. Hyman and C.H. Rathbone, Corporal Punishment in Schools: Reading the Law (1993).

5. These facts stated here derive from official court documents, including court decisions and the briefs filed by the two sides. Even with extensive research I was not able to uncover any contemporary newspaper articles on Neal. I have spoken with the attorneys on both sides.

6. Neal, 229 F.3d. at 1072.

7. 503, U.S. 115 (1992).

8. Neal, 229 F.3d at 1074. In Collins Justice Stevens, writing for a unanimous Supreme Court in a case dealing with the death of a sanitation worker by asphyxia in a sewer, said, "As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decision making in this unchartered area are scarce and open-ended." Collins, 503 U.S.at 125. For a case three years prior to Collins that gives a guideline for analyzing excessive force, see Graham v. Connor,490 U.S. 386,394 (1989). "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against abusive governmental conduct. The validity of the claim must then be judged by reference to the to the specific constitutional standard which governs that right rather than to some generalized 'excessive force' standard." See also the cases that a few years ago dealt with mandatory community service in high school. In those cases the courts also denied the expansion of student Fourteenth Amendment liberty rights. Immediato v. Rye Neck School District, 73 F.3d 454 [106 Ed.Law Rep.

[85]] (2nd Cir. (1996) and Herdon v. Chapel Hill-Carrboro City Board of Education, 89 F.3d 174 [110 Ed.Law Rep. [1037]] (4th Cir. 1996). For more on these cases see my book Mandatory Community Service in High School: The Legal Dimension (1999).

9. Id., citing County of Sacramento v. Lewis, 523 U.S. 833 (1998) and McKinney v. Pate, 20 F.3d. 1550 (11th Cir. 1994).

10. Id.

11. Id.

12. Hall v. Tawney,621 F.2d 607, 613 (2nd Cir. 1980). Hall is base on Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), which is based on Rochin v. California, 342 U.S. 165 (1952).

13. For a 1994 review of the cases dealing with corporal punishment, see the article by Jerry R. Parkinson, Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience, 39 S. Dakota L.R. 276 (1994). (Note the title's reference to the Fourth Circuit's 1980 standard for determining substantive due process.) See also the discussion of Moore in the Commentary section, infra.

14. Id., at 1075.

15. I. M. Rosenberg, A Study in Irrationality: Refusal to Grant Substantive Due Process Protection against Excessive Corporal Punishment in the Public Schools 27 Houston L. Rev. 399 (1990).

16. 223 F.3d 871 [149 Ed.Law Rep. [337]] (5th Cir. 2000).

17. As punishment for talking during roll call in his gym class, Aaron Moore performed "100 'ups and downs,' also known as squat thrusts." Then he did 25 minutes of weight lifting required of the gym students that day. Subsequently, in the following days he developed rhabdomyolysis and renal failure. ("Rhabdomyolysis is a degenerative disease of the skeletal muscle that involves destruction of the muscle tissue, evidenced by the presence of myoglobin in the urine.") He also developed esophagitis/gastritis. He entered the hospital and missed three weeks of school. He continued to experience fatigue and was unable to participate in school sports and gym class. Id. at 873.

18. Moore, 223 F.3d at 876 and 877.

19. Id., at 874.

20. Id., at 877.

21. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

22. Moore, 233 F.3d at 878.

23. Id.

24. Id., at 880.

25. Ingraham, 430 U.S. at 663.

26. Jodi Wigoren, Lawsuits Touch Off Debate Over Paddling in the Schools, N.Y. Times, May 3, 2001, at A1 and A22, citing a report from the U.S. Department of Education.

27. Id.

28. The case that triggered Rosenberg's article, supra, is Cunningham v. Beavers, 858 F.2d 269 [49 Ed.Law Rep [490]] (5th Cir. 1988). See also the subsequent decision in Fee v. Herndon, 900 F.2d 804 [59 Ed.Law Rep. 1003]] (5th Cir. 1990); and Doe v. Taylor Independent School Dist., 15 F.3d 443 [77 Ed.Law Rep. 652]] (5th Cir. 1994).

29. Rosenberg, at 445.

30. Id.

31. See Joshua 6:1-20.

32. Id. at 1076.

33. According to the National Coalition to Abolish Corporal Punishment headquartered in Columbus, Ohio, over 40 organizations favor the abolition of corporal punishment. See the Coalition's Web cite at <www.stophitting.com>

34. Andre R. Imbrogno, Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification, 29 J.L. & Educ. 125, 126 (2000).

LEGAL ISSUES IN TEACHER EVALUATION: WHO'S IN CHARGE OF WHAT ACCOUNTABILITY?

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Abstract

Spurred by the reform studies of the early 1980s, governors and legislatures throughout the country began to rely on the reform reports, purporting to accurately delineate the state of education, to tighten their involvement in state legislation for education. Among the myriad areas of reform reportedly needed, concerns about the state teacher evaluation surfaced. Armed with this research, legislatures began focusing on account-ability through teacher evaluation as a means of improving the state of the schools. Between the years of 1983-1985, twenty states attempted their first enactment of legislation for teacher evaluation, signaling the beginning of a legislatively mandated movement toward accountability.[1] By the end of this first reform movement in 1992, which formed the basis forming the accountability movement in full effect at present, thirty-eight states had enacted state-level legislation on teacher evaluation.[2] However, few states required and provided training of evaluators who were to perform these teacher evaluations. At present, forty-two states[3] have some form of teacher evaluation legislation, with thirty-four[4] specifying the person(s) responsible for conducting the teacher evaluation procedures. This research focuses on four questions: (1) Who is the legislature currently holding accountable for conducting teacher

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[1] Wuhs, S.K. & Manatt, R.P. (1983). The pace of mandated teacher evaluation picks up. American School Board Journal, 170(5),28.

[2] Furtwengler, C.B. (1995). State Actions for Personnel Evaluation: Analysis of Reform Policies, 1983-1992. Education Policy Analysis Archives, Vol. 3, No.4, 1-24.

[3] Alaska Stat. 14.20.149 (2001), A.R.S. 15-537 (2000), Ark. Stat. Ann. 6-17-1504 (2001), Cal Ed Code 44660, 44661.5, 44662 & 44664 (1999), Colo. Rev. Stat. 22-9-101 through 109 (1999), Conn. Gen. Stat.10-151b (2001), Fla. Stat. 231.29 (2000), O.C.G.A. 20-2-210 (2000), HRS 302A-638 (1999), Idaho Code 33-514 (1999), 105 ILCS 5/24A-1 (1999), 5/24A-3, 5/2-3.58, 5/24A-4, 5/24A-5, 5/24A-6, 5/24A-8 (2000), Burns Ind. Code Ann. 20-6.1-9-1 through 20-6.1-9-8. Burns Ind. Code Ann. 20-1-1-6.5 (2000), Iowa Code 279.14 (1998), 279.23A (1997), 272.33 (1997), K.S.A. 72-9001-9005 (2000), KRS 156.101 (1998), La.R.S. 17:3902-3904, 17:391.4 (2000); La.R.S. 17:391.5, 20 A.M.R.S. 13802 (2000), Mass. Ann. Laws ch. 71, Sec. 38 (2001), MSA 15.1983, 15.1993, Minn. Stat. 122A.40-.41 (1999), 168.128 R.S. Mo. (1999), R.R.S. Neb. 79-828 (2000), NRS 391.3125 (2001), N.J. Stat. 18A:27-3.1, 18A:6-75 (2001), N.M. Stat. Ann. 22-2-1, 22-2-2, and 22-10-3.1(2000), N.C. Gen. State 115C-333 and 335 (2000), N.D. Cent. Code 15-47-27.1 (2000), ORC Ann. 3319.111 (Anderson 2000), 70 Okl. St. 6-101.10-11, 101.24, ORS 342.850, 24 P.S. 11-1122-1123 (2001), R.I. Gen law 16-2-9 and 16-2-11, S.C. Code Ann 59-5-85 (2000), 59-26-30(B), S.D Codified Laws 13-43-26 (2001), Tenn. Code Ann. 49-5-5204-5205 (2001), Tex. Educ. Code 21.351-352. 356 (1999), Utah Code Ann. 53A-10-101, 104, 106-110, 53A-10-103, Va. State. 22.1-303 and 22.1-295 (1999), Rev. Code Wash (ARCW) 28A.405.100, 110, 120, 130, and 140, W.Va. Code 18A-3A3, 18A-2-12, 18-2-23A, 18A-3-1b (2000) Wis. State 121.02, Wyo. Stat. 22-3-111(2001)

[4] The thirty four states specifying the person/entity responsible for conducting the teacher evaluation procedure are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

evaluations? (2) What are evaluators responsible for doing in relation to the teacher evaluation? 3) *What* input information are evaluators responsible for analyzing to determine teacher evaluation results? and 4) What are the requirements for training evaluators for teacher evaluation? Evaluation training is an important component of accountability in teacher evaluation, especially if one of purposes and/or uses of the data in the summative cycle is dismissal. The results of this research show that perhaps it is the legislature that is in need of accountability, especially in the formulation of the statutes.

Legal Issues in Teacher Evaluation: Who's In Charge of What Accountability?

Introduction

Teacher evaluation, begun as a means of measuring the competency of teachers and determining non-renewal and dismissal actions, has grown into a means of fostering professional growth and development for teacher as a continuous improvement cycle throughout their educational career. The once unilateral process that precluded the involvement of the teacher or other personnel, relying solely on the views of the principal, has grown into a process that includes not only the teacher but in some states, community persons, student scores on exams, and outside information being used to determine the stature and often the employment status of the teacher. It would follow, then, that in order to conduct and analyze appropriate evaluations, the skills and knowledge base of the administrator would necessitate preparation, pedagogical knowledge, observation skills, data analysis skills, recognition of strengths and weaknesses, communication and other professional expertise used in performing the task of evaluation. In addition, in states where teachers are afforded an improvement plan and/or remediation plan, principals must have knowledge regarding not only the development of the plan, but the skills and ability to follow through with the plan and re-evaluate the teacher based upon growth and development activities. Additionally, in many states the ultimate purpose or use of teacher evaluation is dismissal or non-renewal, the principal must be able to clearly document at each step the manner in which the teacher did not meet the 'standards' or 'performance objectives' as set forth by the instrument, improvement or remediation plan. Finally, in an effort to develop and implement a fair and equitable process for all parties involved in these critical employment decisions, both the principal as evaluator and instructional leader, and the teacher must have a working knowledge of the criteria, components and expectations of formative and summative evaluative content and expectations, input data, systematic processes, measurement standards, timeframe, instrumentation and expectations for which they are held responsible. It is only through the lenses of uniform expectations and knowledge, of being able to interpret the whole as more than the sum of discrete parts, observations or facts that effective teacher evaluations become an accurate and practical process to be developed and implemented; it is only then that legislatures will be able to hold principals accountable for teacher improvement and attempt to link that to statewide accountability measures on which have a basis for comparisons of improvement. The major question in this research is, are legislatures providing the appropriate framework for developing accountability through teacher evaluation? Many states provide some framework for teacher evaluation, which the legislature purports to be efforts toward accountability in the school, yet provides no means of integrating or supporting the process so it becomes institutionalized and thus school, yet provides no means of integrating or supporting the process so it becomes institutionalized and thus integrated into the larger arena of school improvement. It is only through the institutionalization of the evaluation process that the impact of the purpose of teacher evaluation–teacher improvement--will reach the classroom to promote positive changes in students. At present, the teacher evaluation process is unconnected to student learning. As a result of the lack of definitive frameworks from the legislature, efforts at teacher improvement through evaluation are not recognizable as such if and when they reach the classroom. The current legislative efforts at teacher evaluation are not congruent enough within the state statutes to provide the various levels of the organizations involved with a means of being accountable for the teacher evaluation efforts: teaching-learning processes and needs are not linked to the complexities or realities of the administrative or organizational needs of the schools, and neither is therefore responsive to the external and poorly articulated and divergent requirements of the state statutes designed to provide guidance and accountability to the process of teacher evaluation. The result is that the efforts at change that the legislatures have taken through state statutes on teacher evaluation have provided fragmented results, making interstate or intrastate comparisons of improvement or accountability for teacher evaluation impossible to measure. The lack of support from the infrastructure of the state statutes for evaluation have provided little to develop criteria of success, which in turn undermines accountability. Administrators are occupied with managing the infrastructure of the teacher evaluation to assure 'accountability'-- the paperwork and timelines-- with mixed messages as to the rationale and purpose of the process, and thus have little time, and often little knowledge, to improve the teaching-learning process—the very purpose of the teacher evaluation movement and intent of the legislatures in the first place. Evaluation becomes a ritual to be performed to produce a product rather than a process for improvement. Although policy makers are attempting to send a message to school administrators and other personnel—that of accountability- with the main focus on improving teaching and learning, the statutory and organizational conflicts do not allow for this process to be meaningfully carried through.

Method

To determine the tenets of this question, four methods of research were employed. First, both Lexis and Westlaw computer based research was done to locate the updated statute for each state implementing a teacher evaluation process. Second, the state code was checked by hand in the law library stacks. Third, each state statute was dissected to determine the interrelationships and context of the construction, forming the database for analyzation of the meaning. Each citation was checked against the published version and the topical index for each state to determine conformance with the computerized citations. Finally, a database for each discrete area of the statute subject to analyzation for this research was developed. Forty-two states[5] have statutory language regulating the evaluation of classroom teachers. At least six of the forty-two state statutes on teacher evaluation are located within other provisions of the state code and do not necessarily contain separate subtitles or sections that directly address teacher evaluation. For example, in Michigan, teacher evaluation is addressed under Teacher Tenure Statute; in Minnesota teacher evaluation is under Employment Contracts; in Nebraska it is under Teacher and Administrator Tenure; in Iowa it is listed under School District Directors Powers and Duties; in Wisconsin it is subsumed under School District Standards; in Idaho it is under Issuance of Annual Contracts; and in Virginia evaluation is mentioned under Employment of Teachers.

I: Determining who the State statutes hold accountable for the task of evaluating teachers

At present, thirty-four state statutes determine who is to be accountable for conducting teacher evaluation.[6] Although it is widely assumed that the principal is the person responsible for conducting the evaluation,[7] that perception has not been developed from state legislation as only eleven state statutes specifically designate the principal as the evaluator.[8] Other persons designated by the various state statutes as being responsible for the evaluation of teachers are (in descending order): the employee's supervisor or a supervisor;[9] a site administrator or other administrator;[10] the superintendent,[11] versus under the control of the superintendent;[12] the local governing board or State Board of Education,[13] as differentiated from the governing board determining who is qualified to evaluate[14] or the evaluations being 'caused' by the board;[15] the assistant principal;[16] or the principal's designee.[17] Colorado lists the person responsible as the principal or the site administrator, with no explanation of the difference between these two persons. Following these categories of persons responsible for the evaluation of teachers, several states have other positions who may be the responsible party. They are: an appropriately trained evaluator;[18] vocational director;[19] an assessment team;[20] a supervisor in any educational area;[21] the assistant superintendent;[22] and those who have administrative certification and training.[23] Three states have other configurations of person mentioned as options for evaluators. These personnel are: persons approved by the board, classroom teachers from a different campus, and the department or grade level chair in Texas; a team of trained teachers or K-12 supervisors from outside the school system in Tennessee; and a peer review committee for probationary personnel or non-probationary personnel, and a school site management team in Minnesota.

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[5] Alaska Stat. 14.20.149 (2001), A.R.S. 15-537 (2000), Ark. Stat. Ann. 6-17-1504 (2001), Cal Ed Code 44660, 44661.5, 44662 & 44664 (1999), Colo. Rev. Stat. 22-9-101 through 109 (1999), Conn. Gen. Stat.10-151b (2001), Fla. Stat. 231.29 (2000), O.C.G.A. 20-2-210 (2000), HRS 302A-638 (1999), Idaho Code 33-514 (1999), 105 ILCS 5/24A-1 (1999), 5/24A-3, 5/2-3.58, 5/24A-4, 5/24A-5, 5/24A-6, 5/24A-8 (2000), Burns Ind. Code Ann. 20-6.1-9-1 through 20-6.1-9-8. Burns Ind. Code Ann. 20-1-1-6.5 (2000), Iowa Code 279.14 (1998), 279.23A (1997), 272.33 (1997), K.S.A. 72-9001-9005 (2000), KRS 156.101 (1998), La.R.S. 17:3902-3904, 17:391.4 (2000); La.R.S. 17:391.5, 20 A.M.R.S. 13802 (2000), Mass. Ann. Laws ch. 71, Sec. 38 (2001), MSA 15.1983, 15.1993, Minn. Stat. 122A.40-.41 (1999), 168.128 R.S. Mo. (1999), R.R.S. Neb. 79-828 (2000), NRS 391.3125 (2001), N.J. Stat. 18A:27-3.1, 18A:6-75 (2001), N.M. Stat. Ann. 22-2-1, 22-2-2, and 22-10-3.1(2000), N.C. Gen. State 115C-333 and 335 (2000), N.D. Cent. Code 15-47-27.1 (2000), ORC Ann. 3319.111 (Anderson 2000), 70 Okl. St. 6-101.10-11, 101.24, ORS 342.850, 24 P.S. 11-1122-1123 (2001), R.I. Gen law 16-2-9 and 16-2-11, S.C. Code Ann 59-5-85 (2000), 59-26-30(B), S.D Codified Laws 13-43-26 (2001), Tenn. Code Ann. 49-5-5204-5205 (2001), Tex. Educ. Code 21.351-352. 356 (1999), Utah Code Ann. 53A-10-101, 104, 106-110, 53A-10-103, Va. State. 22.1-303 and 22.1-295 (1999), Rev. Code Wash (ARCW) 28A.405.100, 110, 120, 130, and 140, W.Va. Code 18A-3A3, 18A-2-12, 18-2-23A, 18A-3-1b (2000) Wis. State 121.02, Wyo. Stat. 22-3-111(2001).

[6] The thirty four states specifying the person/entity responsible for conducting the teacher evaluation procedure are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

[7] Peterson, K., Wahlquist, C., Bone, K., Thompson, J., and Chatterton, K. Using More Data Sources to Evaluate Teachers. Educational Leadership, February 2001. 40-43.

[8] Colorado, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Virginia,

In the statutes of thirteen states,[24] only one person is designated to be the evaluator, and in only three[25] of these thirteen states is that person the principal.

This range of personnel determined by the legislature to have the responsibility of making judgments regarding the teacher evaluation—and perhaps ultimately the employment status of the teacher-- provides an interesting view of

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Washington, and Wyoming.

[9] Florida, Iowa, Indiana, Kentucky, Michigan, Pennsylvania, Texas and Utah.

[10] Alaska, Arkansas, Colorado, Kansas, Illinois, Nevada, Oklahoma,

[11] Arkansas, Connecticut, North Carolina, Ohio, and Virginia

[12] Massachusetts and Rhode Island

[13] California, Illinois, Louisiana, Minnesota, and Ohio

[14] Arizona

[15] Missouri and Oregon

[16] Illinois, Louisiana, Ohio, Tennessee

[17] Utah, and Washington

[18] Georgia

[19] Ohio

[20] North Carolina

[21] Ohio

[22] Pennsylvania

[23] West Virginia

[24] Alaska, Connecticut, Florida, Georgia, Iowa, Kansas, Kentucky, Michigan, Nevada, New Mexico, Oklahoma, and Wyoming

[25] New Mexico, Washington, Wyoming

the legislatures' perceptions of accountability. It does not appear that the legislature, although holding the principal primarily or fully responsible in eleven states, views the principal as the only person accountable for teacher evaluation. This is an interesting perspective in light of the fact that many states are holding the principal directly accountable for school improvement, improved test scores and ultimately the reflection of these in their own evaluations, with not only monetary bonuses for the school at stake, but the principal's job as well.

II: Determining what state statutes are holding evaluators responsible for doing in relation to the teacher evaluation

Numerous states provide guidance in the teacher evaluation statutes to assist in determining what areas the legislature has determined are to be included in the realm of the evaluator's responsibilities, or in the area of judgment for which the evaluator is responsible. Among the twenty-seven states[26] listing responsibilities or tasks to be completed by the person conducting the evaluation of the teacher, the following provisions are most often found in the states' statutes: fourteen states statutes require the evaluator to do an observation;[27] six of these fourteen state statutes use language that would determine more than one observation is to be conducted;[28] one state allows classroom observation to be optional;[29] one state requires observations by both the principal and assistant principal;[30] nineteen states require some type of written report and/or evaluation in writing;[31] eight states require the evaluator to develop, recommend or implement an improvement or remediation plan following the evaluation,[32] with the language of one statute requiring the "school district" not a person to develop the plan of improvement,[33] a 'board designee' to confer with the teacher regarding recommendations for areas of improvement in one state,[34] with three other states requiring a professional growth plan[35] or a developmental plan for those who are in need of such plans as a result of the evaluation,[36] and four additional states requiring that assistance be provided for teachers in need of such.[37] Along with these components of the process that the evaluator has responsibility for, six states require that the evaluator consult/confer/or conference with the teacher, although it is not delineated at what stage of the evaluation cycle this is to take place;[38] three state statutes require pre-evaluation conferences,[39] and four have specified post-conferences as a requirement to be done by the evaluator as part of the evaluation process.[40] Texas has determined that the conference "will be diagnostic and prescriptive with regard to remediation",[41] and Washington requires that two conference "opportunities" are given.[42]

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[26] Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin

[27] Alaska, Arizona, Colorado, Georgia, Illinois, Louisiana, Michigan, Nebraska, New Jersey, Ohio, Oregon, Tennessee, Utah, Washington

[28] Alaska, Colorado, Georgia, Michigan, Oregon, Tennessee

[29] Louisiana

[30] Georgia

[31] Arkansas, California, Colorado, Florida, Idaho, Kansas, Kentucky Louisiana, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin

[32] Colorado, Alaska, Arizona, California, Illinois, Indiana, Utah, West Virginia

[33] Alaska

[34] Arizona

[35] Louisiana

III: Determining what information evaluators are held accountable for analyzing in relation to teacher evaluation

Nineteen[43] state statutes have delineated the criteria upon which the evaluation is to be determined. Among the input data to be evaluated and considered are: progress of pupils and performance;[44] instructional methods, techniques and strategies;[45] adherence to curricular objectives;[46] classroom instruction;[47] participation in professional development/development plan/activities;[48] communication and interpersonal skills with students, parents, other teachers, administrators and other personnel;[49] adherence to procedures and rules;[50] personal conduct;[51] efficiency;[52] ability;[53] planning/preparation;[54] attendance;[55] classroom management;[56] competency and knowledge of subject matter;[57] personal qualities;[58] self-evaluation;[59] job description;[60] personality;[61] pupil reaction;[62] observable, job related behaviors;[63] discipline/management;[64] professional preparation and scholarship;[65] and, interest in teaching pupils.[66]

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[36] Michigan, Indiana
[37] California, Oklahoma, South Carolina, Tennessee
[38] Arizona, California, Kentucky, Nevada, South Carolina, Utah
[39] Louisiana, Oregon, Tennessee
[40] Louisiana, New Jersey, Oregon, Tennessee
[41] Tex. Educ. Code 21.351-352 and 356(1999)
[42] Rev. Code Wash (ARCW) 28A.405.100, 110, 120, 130, and 140
[43] Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nebraska, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington
[44] California, Colorado, Florida, Georgia, Massachusetts, Tennessee, Texas, Virginia
[45] California, Illinois, Pennsylvania, Virginia, Washington
[46] California,
[47] Colorado,
[48] Georgia, Massachusetts, Michigan, Tennessee
[49] Georgia
[50] Georgia
[51] Georgia, Kansas
[52] Hawaii, Kansas
[53] Hawaii, Kansas
[54] Illinois, Pennsylvania,
[55] Illinois

In South Carolina, the teacher evaluation is based on the National Board for Professional Teaching Standards (NBPTS) by statute; in California, the legislature provides the use of the standards found in the National Board for Professional Teaching Standards in the teacher evaluation process as an option.

Some of the more interesting areas of teacher evaluation come from a few select state statutes. For example, in eight states,[67] the issue of pupil progress, improvement or performance is of significant importance to be part of the teachers' evaluation. The trend toward holding teachers accountable for the progress and success of the students in their charge has been growing slowly with changes in the perceptions of accountability in the schools. In only three[68] states is the issue of teacher competence and knowledge of their subject matter of sufficient concern to the legislature to place it into statute. Although there has been significant public outcry and purported concern in the past several years regarding discipline in the schools, only two[69] state legislatures have determined to hold teachers responsible for discipline in the evaluation process.

While Texas requires the teacher evaluation to be determined on "observable, job-related behaviors",[70] three other statutes have incorporated language that is significantly vague, leaving interpretation and meaning ambiguous at best. The states of Hawaii[71] and Kansas[72] require teachers to be evaluated on "efficiency" and "ability", while

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[56] Illinois, Kansas, Virginia, Washington
[57] Illinois, Virginia, Washington
[58] Kansas
[59] Louisiana
[60] Louisiana
[61] Pennsylvania
[62] Pennsylvania
[63] Texas
[64] Texas, Washington
[65] Washington
[66] Washington
[67] California, Colorado, Florida, Georgia, Massachusetts, Tennessee, Texas, Virginia
[68] Illinois, Virginia, Washington
[69] Texas, Washington
[70] Tex. Educ. Code 21.351-352 and 356 (1999)
[71] HRS 302A0638 (1999)
[72] K.S.A.72-9001-9005 (2000)

Pennsylvania[73] has opted for "personality" as a measure of evaluation, and Washington[74] requires evaluation on "professional preparation and scholarship" and interest in teaching pupils."

In another eight state statutes, it has been determined who will have input into the evaluation process. Among the states with provisions for input by various constituents are considerations from: students;[75] parents;[76] community members;[77] classroom teachers;[78] affected collective bargaining units;[79] the administrator;[80] peers;[81] and, evaluation by staff.[82] Two of the states with the most interesting aspects of constituents having input into the teachers' evaluations are Florida, where the evaluator must consider how the teacher is or has been "maintaining positive collaborative relationships with students; families to increase student achievement"[83], and Kansas, where the evaluator must consider the "community attitudes toward support for and expectations with regard to educational programs" in addition to "comment[s] and suggestions from other community interests".[84]

It would appear that more state statutes are moving in the direction of involving a broader range of stakeholders in the evaluative process for teachers. First to be involved should be the teacher him/herself. This trend is not yet seen to any degree in the state statutes, although the concept of student, parent, community and peer input appears to be gaining with the legislatures. Each of these stakeholders brings important insights into the educational arena for the teacher and their role. However, caution must be taken by the legislature developing the statutes and the evaluator interpreting the data to determine the appropriateness of the information in light of the nature and weight of the external stakeholder input, as well as that of peers and students due to bias and other critical factors that are not easily controlled, leaving questions of data validity.

IV: Determining what training is legislatively required for the evaluators

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[73] 24 P.S. 11-1122-1123 (2001)
[74] Rev. Code Wash (ARCW) 28A.495.100,110,120,130 and 140
[75] Alaska, Colorado, Utah
[76] Alaska, Colorado, Florida
[77] Alaska
[78] Alaska
[79] Alaska
[80] Alaska
[81] Colorado, Florida, Utah
[82] New Mexico
[83] Fla. Stat. 231.29 (2000)
[84] K.S.A. 72-9001-9005 (2000)

Regardless of the persons required or designated to be the teacher evaluator, logic dictates that there would be training available to for these persons. Evaluation is a complex process, requiring—at a minimum--a combination of qualitative and quantitative data gathering and analysis skills; instructional leadership; pedagogical knowledge; observation skills; conferencing skills; written and oral communication skills; and, knowledge of summative and formative evaluative content and expectations. In addition, the evaluator must then determine how to translate this data, and the strengths and weaknesses perceived in each area of the evaluation instrument, into an operational improvement or remediation plan, if that is part of the evaluation cycle in the district or state.

In South Carolina, the teacher evaluation is based on the National Board for Professional Teaching Standards (NBPTS) by statute; in California, the legislature provides the use of the standards found in the National Board for Professional Teaching Standards in the teacher evaluation process as an option. This would imply that the person(s) conducting the teacher's evaluation is thoroughly familiar with and knows the appropriate use of the content and process of this material, in addition to being able to make both qualitative and quantitative decisions based on the data gathered.

Of the forty-two states that have statutory requirements for teacher evaluation, nine[85] specify requirements for some type of training to do teacher evaluation. The state statutes for evaluating teachers, regardless of who is doing the teacher evaluation, have the following requirements: must have an evaluators license or endorsement;[86] training provided by the state universities or colleges that have teacher, principal, or administrator education programs;[87] the local district is responsible for the provision of training;[88] the statement in statute is "shall receive training" with no other guidance;[89] and, six states determine that the training shall be under the approval and provision of the SBOE.[90] Content of the training for persons to be teacher evaluators is determined by statute in three of the nine states. These three states require training in the area(s) of: analysis of lesson plans, classroom observation, analysis of data, performance improvement strategies, and communication skills for persons evaluating teachers, and communication skills, analysis of employee performance, analysis of data, performance improvement strategies for person being evaluated who are other than teachers;[91]in proper techniques for effectively evaluating certified school employees and in the use of the school district evaluation system, as well as the three phases/levels of evaluation, each for a different purpose;[92] and, whether employee has improved student learning, development and implementation of action plans, process for contract renewal, and dismissal process.[93] As can be inferred by this analysis, legislatures are hesitant to prescribe the contents of training programs, most likely due to the intense 'educational' focus of the materials and processes involved. However, as can also be determined, three legislatures have enacted statutes to attempt accountability in the evaluative process, with one state statute clearly focusing on improvement,[94] and the other on contract renewal or dismissal.[95] The two clearly different foci are indicative of the incongruencies seen throughout the nation in state statutes on teacher evaluation, reflecting the state of the matters in discussion in numerous professional journals[96] and this paper.

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[85] Colorado, Florida, Illinois, Iowa, Kentucky, Louisiana, North Carolina, Oklahoma, West Virginia
[86] Iowa
[87] Colorado
[88] Florida
[89] Louisiana
[90] Colorado, Illinois, Kentucky, North Carolina, Oklahoma, West Virginia

Conclusions and Suggestions

This paper has attempted to analyze four categories of state statutes involved with the evaluation of teachers. The areas examined for this research were: (1) the person(s) the statute determines as responsible for conducting the teacher evaluation; (2) the training required of the person conducting the evaluation process; (3) the evaluator's responsibilities as delineated by the statute; and (4) the persons who have input into the evaluation process and the nature of the input used to determine the teachers' evaluation. Only five state statutes—Colorado, Florida, Illinois, Kentucky and Louisiana—contained information in each of the four areas. The area with the least information was that of Training Requirements, while the area of input, both by whom and what type of input contained the most information in the statutes. The categories with the least consistent information across the state statutes were those of the designated evaluator and the training for the evaluator.

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[91] Iowa

[92] Kentucky

[93] North Carolina

[94] Iowa

[95] North Carolina

[96] See for example, Thrust for Educational Leadership, Phi Delta Kappa, Education, Educational Leadership, NEA Today, Theory Into Practice, Independent School, and Educational Evaluation and Policy Analysis among others.

Although each state statute is unique in characteristics, form and content regarding teacher evaluation, lending to significant incongruencies when attempting to make determinations regarding the status of teacher evaluations and the teaching force and its impact or success on students, there are several factors that would appear to lend themselves to successful teacher evaluation systems. These factors include: (1) Legislatures, through state statutes, must provide the schools with clearly articulated statutes outlining the purpose, processes and support systems by which they can evaluate and improve teachers. The state statutes must be purposefully directed toward improvement efforts if that is what the legislature is to hold schools accountable for; (2) The process of improvement is continuous, thus appropriate expectations and timelines for improvement must be established, with the means of supporting and sustaining the process through meaningful professional development efforts over a reasonable period of time. The efforts must be developed through individual and group efforts, data driven, continuous, and related to instruction and learning; (3) Legislatures determining the implications of not requiring evaluator training as this relates to legal actions in using evaluations in dismissal and termination; efforts should focus on development and improvement, not dismissal and termination; (4) Implications of having personnel other than principal, assistant principal or an administrator involved in the evaluation when dismissal or termination is at stake: assuring that the purposes and results of the statutory language is congruent not only throughout the teacher evaluation statute, but with that of statutes addressing dismissal and termination of teaching personnel as well; (5) Provisions for the active, participative involvement and input of the teacher in the process, at the pre-conference stage of establishing goals, post-conference stage of follow-up, evaluative stages; (6) Clear timelines and activities for both the formative and summative stages of the evaluation cycle: efforts should be aimed at the retention of teachers through well-developed and executed improvement plans for all teachers; (7) Training requirements for both teachers and evaluators in the process and product of evaluation; administrators must develop the capacity to integrate new teaching standards into and develop an expansive repertoire of teaching knowledge, skills and abilities supporting the changes required for modern curricula and students; (8) Means of motivating, determining and supporting effective and meaningful professional development activities to provide opportunities and interventions for teachers that are aligned with specific and discrete areas in need of improvement as determined by the individual needs of each evaluation: schools must invest in training efforts, reward schools making improvements based on documentable evidence and provide opportunities for teachers and administrators to network with outside resources to bring new and innovative methods, people and ideas into the school system to foster an expansive array of changes and ideas. This external involvement can reinforce and motivate teachers and administrators to grow and seek solutions to complex issues in the classroom and schools that are beyond the confines of the schools. These minimum efforts, based upon the analyzation of these four statutory areas would assist evaluators, administrators, and teachers in becoming more accountable and more effective in the role of teaching for successful results. Accountability exists to improve teaching and learning: school systems require guidelines within which they can develop accountability efforts to respond to the public demands. The conflicts, fragmented and inconsistent guidance currently found throughout state statutes on teacher evaluation, as seen in this paper, are one indication of the need to revisit statutory requirements if accountability is to become a reality. Incorporating the suggested changes into the state statutes on teacher evaluation would be one means of providing more accountability to all stakeholders involved, including the legislature.

State Legislated Teacher Evaluation Accountability

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Alabama	no statute for teacher evaluation			
Alaska[1]	*site administrator under supervision of a person w/Type B certificate and who has training in the use of school district evaluation system		*observation(s) *school district prepares and implements a plan of improvement	*School Board must consider information from students, parents, community members, classroom teachers, affected collective bargaining units, and administrator
Arizona[2]	*persons who are qualified to evaluate teachers		*a board designee shall confer with the teacher to make specific recommendations as to areas of improvement *observation	*teaching performance
Arkansas[3]	*superintendent or other school administrator		*must be in writing	
California[4]	*governing board		*once a year/every other year *include areas of improvement *inform of needs in writing *confer with employee on needs *endeavor to assist	*option to use NBPTS, or *California Standards for the Teaching Profession *progress of pupils *instructional techniques and strategies *adherence to curricular objectives *suitable learning environment *Participation in the Peer Assistance and Review Program for Teachers

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Colorado[5]	*principals and administrators	*state universities and colleges that have teacher, principal, or administrator education programs *DOE approved education and training in evaluation skills	*direct observation(s) *systematic data gathering *written improvement plan *written evaluation report	*classroom instruction *multiple measures of student performance *peer, parent or student input from standardized surveys optional
Connecticut[6]	*superintendents shall… evaluate Or cause to be evaluated…			*strengths, areas needing improvement, strategies for improvement
Delaware	no statute			
Florida[7]	*individual supervising employee	*local district provides	*written report of the assessment	*parents *primarily performance of students *may consider peer reviews *maintaining positive collaborative relationships with students' families to increase student achievement
Georgia[8]	*appropriately trained evaluator		*observations by principal and assistant principal	*academic gains of students *participation in professional development *application of concepts learned *communication and interpersonal skills w/students, parents, other teachers, administrators, and other school personnel *timeliness *attendance for assigned responsibilities *adherence to procedures and rules *personal conduct

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Hawaii[9]				*efficiency, ability, and other criteria as the DOE determines
Idaho[10]			*written evaluations	
Illinois[11]	*SBOE *administrators *assistant principals in districts exceeding 500,000	*once every 2 years on either school improvement or the evaluation of certified personnel provided by SBOE	*once a year *once every 2 years *personal observation *develop and start a remediation plan, as needed *subsequent evaluations for those on remediation plans	*teacher's duties and responsibilities and the standards to which the teacher is to conform *personal observation *teacher's attendance *planning *instructional methods *classroom management *competency in subject matter
Indiana[12]	*appropriate supervisor			*performance of each certificated employee
Iowa[13]*		*evaluator license or endorsement *is valid for 5 years and renewable *to evaluate teachers: analysis of lesson plans, classroom observation, analysis of data, performance improvement strategies, communication skills *other than teachers: communication skills, analysis of employee performance, analysis of data, performance improvement strategies		

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Kansas[14]	*administrative staff		*written evaluations	*consideration should be given to efficiency, personal qualities, professional deportment, ability, results and performance, capacity to maintain control of pupils or students, and other matters as deemed material *community attitudes toward, support for and expectations with regard to educational programs *comment and suggestions from other community interests should be given *persons evaluated should participate in evaluation and shall be afforded the opportunity for self-evaluation
Kentucky[15]	*immediate supervisor	*trained, tested and certified/ Regulations adopted by KBOE *in proper techniques for effectively evaluating certified school employees and in use of the school district evaluation system *three phases/levels of evaluation, each for different purpose	*in writing on evaluation forms *conference between evaluator and person evaluated	

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Louisiana[16]	*local board *school principal *assistant principal	*shall receive training	*develop professional growth plan *self-evaluation *pre-observation conference *observation *post-conference *classroom visitation (optional) *evaluation must be in writing	*professional growth plan *self-evaluation *job description
Maine[17]				
Maryland	no statute			
Massachusetts[18]	*superintendent shall cause evaluations			*extent to which students satisfy student academic standards *successful implementation of professional development plan
Michigan[19]	*appropriate administrative personnel		*individual development plan *classroom observations	*classroom observations *teacher's progress in meeting IDP goals
Minnesota[20]	*peer review committee for probationary teachers *school site management team *school board *peer review process for non-probationary teachers			
Mississippi	no statute			
Missouri[21]	*board of education of each school district shall cause a Comprehensive, performance-based evaluation			
Montana	no statute			
Nebraska[22]			*classroom observation	*classroom observation

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Nevada[23]	*administrator		*conference *written evaluation	
New Hampshire	no statute			
New Jersey[24]	*SBOE shall cause non-tenured …		*observe and evaluate *post-conference	
New Mexico[25]*	*principal			*evaluation by staff is one component
New York	no statute			
No. Carolina[26]	*principals and superintendents *assessment team	*SBOE develops programs to include: whether employee has improved student learning, development and implementation of action plans, process for contract renewal, dismissal process		
No. Dakota[27]			*written evaluations	
Ohio[28]	*board shall evaluate *superintendent *assistant superintendent *principal *vocational director *supervisor in any educational area		*written report *observation	*observation
Oklahoma[29]	*certified administrative personnel	*SBOE training and workshops	*written evaluations	

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Oregon[30]	*district superintendent shall cause... *must hold teaching licenses *(evaluation must be signed teacher supervisor)		*observations *preevaluation interview *post evaluation interview *written program of assistance, if needed	
Pennsylvania[31]	*under supervision of the superintendent of schools *assistant superintendent, supervisor, or principal			*personality *preparation *technique *pupil reaction
Rhode Island[32]*	*superintendent provides for the evaluation			
So. Carolina[33]			*provided in writing *provide appropriate assistance when weaknesses identified *consult with teacher to establish goals	*NBPTS
So. Dakota[34]*				
Tennessee[35]	*a team of trained teachers *principals, assistant principals *K-12 supervisors from outside school system		*classroom observations *personal conference *pre-evaluation interview *written evaluation *post-evaluation *written program of assistance	*classroom observation *review of evaluations *examinations of professional development activities *indicators of student progress

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
Texas[36]	*teacher's supervisor *person approved by the board of trustees *classroom teacher, from a different campus if possible *department or grade level chair		*conference: diagnostic and prescriptive with regard to remediation *written	*observable, job-related behavior *discipline management *students' performance
Utah[37]*	*principal, principal's designee, immediate supervisor		*written *discussed w/educator *observation *written remediation document *assignment of consulting educator	*several types of evaluation and evidence, such as self-evaluation, student evaluation, peer evaluation, or systematic observations
Vermont	no statute			
Virginia[38]	*superintendents, principals			*student achievement progress, instructional methodology, classroom management, subject matter knowledge
Washington[39]	*principal or designee		*observation *written report *two conference opportunities	*instructional skill *classroom/mgmt *professional preparation and scholarship *student discipline and attendance problems *interest in teaching pupils and knowledge of subject matter *effort toward improvement when needed

State	Evaluator(s)	Training required	Evaluators' responsibilities	Input by/based on
West Virginia[40]	*administrative certificate and training	*through center for professional development or approved SBOE training	*written improvement plan as needed	
Wisconsin[41]			*written evaluation	
Wyoming[42]	*principal			

Endnotes

[1] Alaska Stat. 14.20.149 (2001)
[2] A.R.S. 15-537 (2000)
[3] Ark. Stat. Ann. 6-17-1504 (2001)
[4] Cal Ed Code 44660, 44661.5, 44662 & 44664 (1999)
[5] Colo. Rev. Stat. 22-9-101 through 109 (1999)
[6] Conn. Gen. Stat.10-151b (2001)
[7] Fla. Stat. 231.29 (2000)
[8] O.C.G.A. 20-2-210 (2000)
[9] HRS 302A-638 (1999)
[10] Idaho Code 33-514 (1999)
[11] 105 ILCS 5/24A-1 (1999), 5/24A-3, 5/2-3.58, 5/24A-4, 5/24A-5, 5/24A-6, 5/24A-8 (2000)
[12] Burns Ind. Code Ann. 20-6.1-9-1 through 20-6.1-9-8. Burns Ind. Code Ann. 20-1-1-6.5 (2000)
[13] Iowa Code 279.14 (1998), 279.23A (1997), 272.33 (1997). *[criteria and procedures exclusive management right of the school board]
[14] K.S.A. 72-9001-9005 (2000)
[15] KRS 156.101 (1998)
[16] La.R.S. 17:3902-3904, 17:391.4 (2000); La.R.S. 17:391.5
[17] 20 A.M.R.S. 13802 (2000)
[18] Mass. Ann. Laws ch. 71, Sec. 38 (2001)
[19] MSA 15.1983, 15.1993
[20] Minn. Stat. 122A.40-.41 (1999)
[21] 168.128 R.S. Mo. (1999)
[22] R.R.S. Neb. 79-828 (2000)

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[23] NRS 391.3125 (2001)
[24] N.J. Stat. 18A:27-3.1, 18A:6-75 (2001)
[25] N.M. Stat. Ann. 22-2-1, 22-2-2, and 22-10-3.1(2000) *[found in school principals; additional duties 22-10-6]
[26] N.C. Gen. State 115C-333 and 335 (2000)
[27] N.D. Cent. Code 15-47-27.1 (2000)
[28] ORC Ann. 3319.111 (Anderson 2000)
[29] 70 Okl. St. 6-101.10-11, 101.24
[30] ORS 342.850
[31] 24 P.S. 11-1122-1123 (2001)
[32] R.I. Gen law 16-2-9 and 16-2-11 *[school committees establish standards for the evaluation of personnel]
[33] S.C. Code Ann 59-5-85 (2000), 59-26-30(B)
[34] S.D Codified Laws 13-43-26 (2001) *[official teacher evaluation policy—Adoption by school boards]
[35] Tenn. Code Ann. 49-5-5204-5205 (2001)
[36] Tex. Educ. Code 21.351-352 & 356 (1999)
[37] Utah Code Ann. 53A-10-101, 104, 106-110, 53A-10-103 [*do not have to use an 'instrument' for evaluation]
[38] Va. State. 22.1-303 and 22.1-295 (1999)
[39] Rev. Code Wash (ARCW) 28A.405.100, 110, 120, 130, and 140
[40] W.Va. Code 18A-3A3, 18A-2-12, 18-2-23A, 18A-3-1b (2000)
[41] Wis. State 121.02
[42] Wyo. Stat. 22-3-111(2001)

SEXUAL ORIENTATION AND SEXUAL IDENTITY HARASSMENT IN THE PUBLIC SCHOOLS: EMERGING LEGAL ISSUES

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PRESENTATION OUTLINE

In 1993, the American Association of University Women (AAUW) published Hostile Hallways, a landmark investigation of sexual harassment, discrimination and violence in America's public schools. One major finding of that study was the pervasive use of sexual orientation and sexual identity as the trigger and content of both student-to-student and educator-to-student harassment. Recently, AAUW updated its first study and in 2001, published the results as Hostile Hallways: Bullying, Teasing and Sexual Harassment in School. According to the new report, harassment based on sexual orientation and gender identity is increasing significantly in American schools. Approximately 3 in 5 students now report knowing someone who has experienced sexual orientation-based harassment, up from 51% in 1993, and more than 1 in 3 now report experiencing it themselves, more than double the number (17%) in 1993. Human Rights Watch documented the same phenomenon recently in an investigation that focused exclusively on sexual orientation-based harassment, violence and discrimination in American schools and published its findings in Hatred in the Hallways (2001). According to the Human Rights Watch study, more than two million school-age lesbian, gay, bisexual, and transgender youth, as well as those who are perceived to be, are subjected "to abuse on a daily basis by their peers and in some cases by teachers and school administrators..." (p. 4). Clearly, harassment, discrimination, and even violence based upon sexual orientation and sexual identity represent a serious and increasing problem in America's public schools.

This presentation begins with detailed discussion of sexual orientation and gender identity harassment in schools, including definitions for the various terms of import and the nature and scope of the problem. It then highlights both potential legal liabilities facing school personnel and districts that do not address and alleviate the problem and potential legal remedies available to its young victims. Finally, the presentations concludes with a discussion of recommended action steps that educational authorities should take to address and alleviate sexual orientation and gender identity harassment in schools and thereby lessen the possibility of adverse legal action.

I. WHAT IS THE ISSUE?

A. Definitions:

Sexual Orientation: one's sexual attraction to the opposite sex (heterosexual), the same sex (homosexual, lesbian women, gay men) or to both sexes (bisexual).
Sexual or *Gender Identity:* one's internal sense of being female, male, something other than or in between female and male *(transgender)*.
Gender Variant: behavior that does not conform to traditional, stereotypical gender norms and expectations.
Harassment: unwelcome verbal, written, and/or physical contact, including but not limited to: name calling, teasing, taunting, graffiti, rumors, damage to/destruction of personal property, physical assault.

B. Scope of the Problem:

1. Who are the targets?

Gay, lesbian, bisexual, transgender (GLBT) youth, those who are questioning their sexual orientation and/or gender identity (QT), and those who engage in gender variant behavior (GV) [GLBT, QT and GV youth] are the targets and victims of sexual orientation and gender identity harassment. Thus, some students are targets simply because they are not heterosexual (GLBT youth); others (QT and GV students) are targeted because elements of their behavior (mannerisms, interests, dress, etc.) are assumed by the harassers to be indications of not being heterosexual.

2. Kinds and Frequency of Harassment:

- In a recent national study, 70% of LGBT and QT students reported experiencing verbal abuse and 46% experienced it daily. Nearly one-third experienced physical harassment, and 14% reported experiences of physical assault at school because of their sexual orientation and/or gender identity (GLSEN, 1999).
- In the same study, 40% of GLBT and QT youth from the Midwest, 30% from the West, 22% from the Northeast, and 17% from the South reported being physically harassed at their schools because of their sexual orientation and/or gender identity (GLSEN, 1999).
- In a 1999 study, 80% of GLBT adolescents reported having experienced verbal insults, 44% were threatened with violence, 31% have been chased or followed, and 17% have been physically assaulted (Lock & Steiner, 1999).
- In Washington, GLBT youth are 5 times more likely their heterosexual peers to be targets of violence in school (Safe Schools Coalition, 1995).
- In two national studies, between 3 of 4 and 9 of 10 students reported that they would be very upset if their school peers called them gay or lesbian. The percentage of girls being called lesbian when they did not want to be almost tripled since 1993 (from 5 to 13%), and the proportion of boys being called gay, doubled (from 9 to 19%) in the same period. In both studies, being called gay was more upsetting to boys than being the recipient of actual physical abuse. (AAUW, 1993 and 2001).
- In a 9-city, 3-state survey, one third to one half of lesbian and gay respondents reported being victimized in junior and senior high school (Pilkington & D'Augelli, 1995).
- Ina study conducted by Who's Who Among American High School Students, approximately 40% of high school "high achievers" admitted they feel prejudice towards gay people (GLSEN, 2001).
- In a study of high school students in Massachusetts, 97% reported hearing homophobic remarks by peers regularly, and 53% said they heard them from school staff regularly (Garofalo, et. al, 1998).

3. Relative Vulnerability and Risk:

- In a study comparing "straight" and GLBT high school youth, the latter were found to be 4 times more likely to report being threatened with a weapon on school property (Garofalo, et. al, 1998).
- The Seattle Youth Risk Behavior Survey found LGBT youth to be 5+ times more likely to be the target of offensive comments and attacks than their "straight" peers at school. They are twice as likely to feel unsafe or afraid at least some of the time, and they are 3 times more likely to have attempted suicide within the last 12 months than their heterosexual classmates (Safe Schools Coalition, 1999).
- According to the same study, heterosexual students perceived by peers to be GLBT, are significantly more likely to feel and be at risk in school than their heterosexual peers who are not thought to be GLBT. For example, those heterosexuals thought to be LGBT, were 3 times more likely to feel unsafe and miss school, 2 times more likely to be the target of offensive sexual comments/attacks, 2 times more likely to be threatened or injured with a weapon at school, 2.5 times more likely to make a suicide plan, and 3.5 times more likely to have attempted suicide in the last 12 months (Safe Schools Coalition, 1999).
- Of 4000 high school students in Massachusetts, gay, lesbian and bisexual students were found to attempt suicide at a rate four times (40%) as high as their "straight" school peers (10%) (Healy, 2001).
- Two of five LGB and QT students do not feel safe in their schools because of the likelihood of sexual orientation and/or gender identify-based harassment (Garofalo, et. al, 1998).

4. Educational and Psychological Costs:

- The 1997 Massachusetts Youth Risk Behavior Study documented that 22% of GLBT students skip school because they feel unsafe and 24% report having been in a fight at school serious enough to require medical attention (Massachusetts Department of Education, 1997).
- GLBT youth are 2- 3 times more likely to attempt suicide, and 30% of successful teen suicides are committed by GLBT youth (Lambda, 2001).

- In a study of 83,000 youth, students who reported having experienced sexual orientation-based harassment were 7 times more likely as non-harassed students to miss at least one day of school in the past month out of fear for their safety (Reis & Saewyc, 1999).
- In a study of gay and lesbian teenagers, less than 1 in 5 could identify someone who was very supportive of them (Telljohann & Price, 1993).

5. Action / Inaction by School Personnel:

- More than 8 out of 10 school districts have no policies to protect students from discrimination based on sexual orientation (GLSEN, 1999).
- 75% of America's largest school districts provide no training for staff on issues facing GLBT students in their schools (GLSEN, 1998).
- A typical high school student hears anti-gay slurs as often as 26 times a day, and when this happens, faculty intervene only 3% of the time (GLSEN, 1998).
- In a random sample of high school health teachers, 1 in 5 indicated students in their classes often use abusive language when describing homosexuals. (Telljohann, et al., 1995).
- Virtually all (99.4%) of LGBT, QT and GV youth surveyed reported hearing homophobic remarks from other students and almost 40% reported hearing them from faculty and other school staff. Usually no one intervened to stop homophobic comments, but if someone did, it was more likely to be another student (82%) than school personnel (62%). (GLSEN, 1999).
- Among gay and lesbian adolescents (14 – 21 years of age), half reported that homosexuality had been discussed in their classes at school, and of those, 50% of the females and 37% of the males said the subject was handled negatively (Telljohann & Price, 1993).
- Less than half of a random sample of high school health teachers formally teaches about homosexuality. Among those who do, less than half spend one entire class period or more on the subject. In the same study, 1 in 3 health teachers believed their schools were not doing enough to help homosexual students (Telljohann, et. al, 1995).

II. A TAXONOMY OF LEGAL THEORIES FOR REMEDYING SEXUAL ORIENTATION AND GENDER IDENTITY HARASSMENT IN THE PUBLIC SCHOOLS

A. Federal Constitutional Law

1. Equal Protection

a. Sex discrimination

i. State-sponsored educational institutions may not discriminate in their treatment of males and females unless the sex-based discrimination is substantially related to an important governmental objective. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

ii. Public schools are required to provide male and female students with equivalent levels of protection from battery and harassment absent an important governmental objective. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

b. Sexual orientation (actual or perceived) discrimination

i. Discrimination based on sexual orientation and gender identity is only entitled to rational basis review. State action motivated by animus towards a class because of sexual orientation fails to satisfy even this lowest level of scrutiny. Romer v. Evans, 517 U.S. 620 (1996).

ii. There is no rational basis for permitting students to assault other students because of their sexual orientation or gender identity while protecting other students from similar forms of harassment. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); and Montgomery v. Independent School District No. 709, 109 F.Supp.2d 1081 (D.Minn. 2000). See, also, Glover v. Williamsburg Local School Dist. Bd. of Educ., 20 F.Supp.2d 1160 (S.D. Ohio 1998)(rejected school district's arugment that the Equal Protection Clause does not prohibit discrimination against teachers because of their sexual orientation); and Weaver v. Nebo School Dist., 29 F.Supp.2d 1279 (D. Utah 1998)(school district's decision not to assign a teacher as the volleyball coach because of her sexual orientation had no rational basis and violated the Equal Protection Clause).

2. Due Process

a. Failure to Protect from Harm by Private Actors

i. A state's failure to protect an individual from harm caused by private actors does not give rise to a constitutional violation unless a special relationship between the state and the claimant exists that creates a constitutional duty to protect. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

ii. A constitutional duty to protect arises when by an affirmative exercise of its powers the state:

1) Exercises such custody and control that the individual is deprived of the ability to act on h/er own behalf.

The reported cases find that neither a school's in loco parentis status nor its compulsory attendance laws sufficiently restrain students so as to give rise to a constitutional duty to protect a child from harm by non-state actors. See, e.g., D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992); Doe v. Hillsboro Independent School District, 113 F.3d 1412 (5th Cir. 1997); Sargi v. Kent City Board of Education, 70 F.3f 907 (6th Cir. 1995); J.O. v. Alton community Unit School District 11, 909 F.2d 267 (7th Cir. 1990); Dorothy J. v. Little Rock School District, 7 F.ed 729 (8th Cir. 1993); and Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992).

But, 7th Circuit Court of Appeals has evidenced discomfort with the "no affirmative substantive due process duty to protect students from third parties" rule. It expressly invited future litigants to distinguish the court's earlier decision so as to permit it to find that that the school was in a custodial relationship with its students. Nabozny v. Podlesny, 92 F.3d 446, 459 at fn. 13 (7th Cir. 1996).

2) Creates a danger of harm from a private actor.

At some point, affirmative conduct on the part of the state that directly places individuals in danger, or heighten their risk of bodily harm, becomes sufficient to trigger school board liability. See, e.g., Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989)(woman raped in a high crime area after police arrested her companion, impounded his care, and left her stranded).

b. Failure to Protect from Harm by State Actor

i. The right to be free from abuse at the hands of a public school employee is clearly protected by the Due Process Clause as an aspect of the constitutional right to bodily integrity. See, for example, Stoneking v. Bradford Area School District, 882 F.2d 720(3rd Cir. 1989); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994); and Abeyta v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253 (10th Cir. 1996).

ii. A school district can be held liable for harm inflicted by an employee if an officially executed policy or the toleration of a custom within the school district caused or resulted in the constitutional harm of which the student is complaining. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978).

iii. To succeed on claim that the school's "custom" was to fail to act to prevent abuse by and employee of a student because of h/er sexual orientation and/or gender identity, the student must establish:

1) The existence of a continuing, widespread, persistent pattern of unconstitutional conduct by the school district's employees;

2) Notice or constructive notice to school district's policymaking officials (superintendent and/or school board) of the conduct;

3) School district's policymaking official's tacit approval of the unconstitutional conduct such that its deliberate indifference in its failure to act amount to an official policy of inaction; and

4) The failure to act was the moving force or direct causal link in the deprivation of the student's right to bodily integrity. See, City of Canton v. Harris, 489 U.S. 378 (1989); see also Doe v. Clairborne County, Tennessee, 103 F.3d 495 (6th Cir. 1996)(sexual abuse of student by teacher).

c. Failure to Receive, Investigate and Act Upon Complaints of Constitutional Harm by State Actor

Same test as in a claim of failure to protect from harm by state actor. See, Thelma D. v. Board of Educ. of City of St. Louis, 934 F.2d 929 (8th Cir. 1991).

d. Failure to Train to Prevent Constitutional Harm by State Actor

The test is the same as that for a claim of failure to protect. The need for training may not be obvious from the outset, but a pattern of constitutional violations could put the school district on notice that its employees' responses to a regularly recurring situation were insufficient to protect the constitutional rights of its students. City of Canton v. Harris, 489 U.S. 378, 396 (O'Connor, J., concurring). See, Thelma D. V. Board of Educ. Of City of St. Louis, 934 F.2d 929 (8th Cir. 1991)(warning school districts that in the future it will closely scrutinize bureaucratic hierarchies which, in their operation, tend to insulate its policymaking officials from knowledge of events which may subject them to liability).

3. Right of Privacy - Actual Disclosure/Threaten Disclosure

a. The constitutional right of privacy protected by the 1st, 4th, 5th, 9th and 14th Amendments protects not only an individual's autonomy in intimate matters, but also an individual's interest in avoiding divulgence of highly personal information. Whalen v. Roe, 429 U.S. 589 (1977).

b. A person's sexual orientation/gender identity is an intimate aspect of h/er personhood. Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000)(police threatened to disclose suspected sexual orientation of an arrestee to a family member). Contra, Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990)(police used an employment questionnaire that included questions concerning applicant's sexual history, marital history, family's criminal record, and financial background).

4. Freedom of Expression – Gender Nonconforming Behavior as Symbolic Speech

a. Symbolic speech is constitutionally protected. See, United States v. O'Brien, 391 U.S. 367 (1968). Student symbolic speech that does not materially and substantially interfere with the work of school, Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969), and is not obscene, Bethel School Dist. No. 403 v. Frazer, 478 U.S. 675 (1986), is constitutionally protected.

b. A school district can not prevent a lesbian/gay student from bringing a same-sex date to a school prom. Fricke v. Lynch, 491 F.Supp. 381 (D.R.I., 1980).

c. A school district can not prevent a student expressing h/er gender identity from wearing clothing or accessories that any other male or female student could wear to school without being disciplined. See, Doe v. Yunits, 2000 WL 331621199 (Mass.Super., 2000), aff'rd Doe v. Brockton School Committee, 2000 WL 33342399 (Mass.App.Ct., 2000).

B. Federal Statutory Law - Civil

1. Title IX of the Education Act of 1972, 20 U.S.C. §1681(a).

a. Title IX guarantees students a private cause of action for damages against their school districts for student-on-student (or peer) sexual harassment if their schools maintain a deliberate indifference to known acts of peer sexual harassment. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

b. Department of Education Office of Civil Rights (OCR) "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 66 Fed.Reg. 5512-01 (January 19, 2001).

i. Continues to prohibit both same-sex and cross-sex harassment of gay and lesbian students as long as the harassment is of a sexual nature. Harassment that is "merely" inspired by sexual orientation animus and does not involve sexual conduct is not actionable.

ii. Adds that "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on . . . sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond. . . ."

c. OCR has required, as a condition of settling a Title IX complaint brought by a student alleging sexual orientation harassment, that a school district change its policies to provide express protection against sexual harassment direct at gay and lesbian students and train teachers, staff and students. Commitment to Resolve, Fayetteville Public Schools, OCR Case No. 069971182 (June 8, 1998); Letter from Taylor D. August, director, Dallas Office, Office of Civil Rights, to David S. Buckel, staff attorney, Lambda Legal Defense and Education Fund, June 17, 1998.

2. Family Education Rights and Privacy Act (FERPA or Buckley Amendment), 20 U.S.C. §1232g.

a. As a condition of receiving federal education funds and subject to certain exceptions, FERPA requires schools to provide confidentiality for students' school records. The act does not create a private cause of action. See, e.g., Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1988); and Fay v.South Colonie Central Sch. Distr., 802 F.2d 21 (2nd Cir. 1986).

b. However, FERPA has been held to create an interest that may be vindicated in an action brought under 42 U.S.C. §1983. See, e.g., Doe v. Knox County Board of Education, 918 F.Supp. 181 (E.D.Ky. 1996). *Contra* Norris v. Bd. of Educ. of Greenwood Community Sch. Corp., 797 F.Supp. 1452 (D.D. Ind. 1992).

3. Safe and Drug-Free Schools and Community Act of 1994 (20 U.S.C. §7101 et seq.)

a. The Safe School Act is a federal grant program that requires its recipients to develop anti-violence as well as anti-drug initiatives. At least one court has found that the act does not create a private right of action for students who are subject the violence in recipient schools that have not developed and appropriate school safety plan. Stevenson v. Martin County Brd. of Educ., 2001 WL 98358 (4th Cir. 2001).

b. However, the Safe School Act may create an interest to be free from school violence that can be vindicated in an action brought under 42 U.S.C. §1983.

4. Conspiracy Claims - Civil

a. 42 U.S.C. § 1985(3)

Prohibits two or more persons from conspiring to deprive, either directly or indirectly, any person or class of persons of the equal protection of the law, or of the equal privileges and immunities under the law.

b. 42 U.S.C. §1986

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . . are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages cause by such wrongful act, which such person by reasonable diligence could have prevented. . . ."

c. See, O.H. v. Oakland Unified School Distr., 2000 WL 33376299 (N.D. Cal. 2000). Court dismissed student's conspiracy claims against certain school administrators personally for failing to prevent multiple attacks against him because of sexual orientation. However, the dismissal was with leave to amend to allege specific facts, based on either direct or circumstantial evidence, that support the student's conspiracy claim. See, also, Montgomery v. Independent School Dist. No. 209, 109 F.Supp. 2d 1081 (D.Minn. 2000)(conspiracy causes of action withdrawn by plaintiff).

C. Federal Statutory Law - Criminal

1. 18 U.S.C. §245(b)

a. Criminal counterpart of 42 U.S.C. 1985.

b. "Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with (1) any person because he is or has been , or in order to intimidate such person or any other person or any class of persons from . . . (E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance . . . shall be fined . . . or imprisoned not more than one year, or both . . . ."

2. Hate Crime Motivation Enhancement – Federal Sentencing Guidelines §3A1.1 (Jul;y 1, 2001).

If a court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected a victim or any property as the object of the offense because of "actual or perceived . . . sexual orientation" the sentence shall be increased by specified amounts.

D. State

1. Constitutional Law

a. Education Clause

   i. Almost every state has an express state constitutional provision guaranteeing a free public education although the specific language various from state to state.

   ii. Some states have interpreted their education clause to require that every child must be given the same opportunity and access to an adequate education. See, e.g., Rose v. The Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989).

b. Due Process, Equal Protection, Privacy, and Free Speech

   i. May be more extensive that under U.S. Constitution

   ii. E.g., In Bowers v. Hardwick, 478 U.S. 186 (1986) the U.S. Supreme Court held that the right of privacy guaranteed by the U.S. Constitution did not include a right for consenting adults to engage in same-sex sexual activity in the privacy of their own home. But, in Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), the Kentucky Supreme Court found that the right of privacy guaranteed by the state's constitution did include such a right.

2. Statutory Law – Civil

   a. State Versions of Federal Law

   Many states have enacted state statutes similar to Title IX and FERPA. And, every state receiving federal funds pursuant to the Safe and Drug-Free Schools and Community Act of 1994 must have a state Safe School Act.

   b. Prohibitions Against Sexual Orientation Discrimination in Education

   Seven states prohibit sexual orientation discrimination in education – California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin.

3. .Professional Ethics Codes for Educators

   a. Approximately 2/3 of all states have some form of ethics codes for public school educators.

   b. Most are overseen by a State Practice Commission or Professional Standards Board that power to suspend and rescind state licenses and [professional certificates.

   c. Most incorporated into state statute and/or administrative regulation. Three or four have guidelines/statements of ethical standards for school boards only (e.g., Indiana, NJ)

   d. Virtually all statements of professional ethics for educators include language about the fair and equitable treatment of, and the provision of equal educational opportunities for, all children.

   e. About half enumerate bases for prohibited discrimination, e.g., race, sex, national origin; but only four specify sexual orientation (Alaska, Connecticut, Florida, and Pennsylvania).

4. Statutory Law – Criminal

   a. Garden-variety criminal statutes are available, depending upon the form of the harassment (assault, menacing, wanton endangerment, terroristic threatening, stalking, sex offenses, kidnapping, etc.) to punish the perpetrator.

b. Hate Crime Penalty Enhancement Laws

Twenty-three states and Washington, D.C. have penalty-enhancement hate crimes laws that include sexual orientation – Arizona, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin.

c. Reporting Statutes

Educators are required to report suspected neglect and abuse of children. Criminal sanctions are imposed for failure to do so. Violation of reporting statute also may give rise to liability on the basis of negligent hiring or retention where plaintiff can show that reporting would have prevented subsequent abuse. See, Maraquay v. Eno, 662 A.2d 272 (N.H. 1995).

5. Tort Claims

a. Negligence of Administrators and/or Teachers

i. Duty to Create and Maintain a Safe Environment for Students – Reasonable Supervision, Duty to Protect

See, Todd M. v. Richard L., 696 A.2d 1063 (Conn. Super. Ct. 1995)(director of transportation and school bus driver had a duty to protect plaintiff student from intentional conduct of other students). J.N. v. Bellingham School Dist. No. 501, 871 P.2d 1106 (Wash.Ct.App. 1994)(school district had a duty to protect the pupils in its custody from dangers reasonably to be anticipated including peer attacks).

ii. Negligent Hiring

Schools have a duty not to hire or retain employees that it knows or should know have propensity for abusing students. See, Maraquay v. Eno, 662 A.2d 272 (N.H. 1995).

b. Other Tort Claims Against Schools, Administrators and Teachers

i. Invasion of Privacy

ii. Intentional Torts

E. International Law

1. The Right to Protection

a. International Covenant on Civil and Political Rights (ICCPR), art. 24, 999 U.N.T.S. 171 guarantees to a child the right "to such measures of protection as are required by his status as a minor." The United States did not take any reservations to this article when it ratified ICCPR.

b. ICCPR, art. 7, prohibit "cruel, inhuman or degrading treatment." The United States did enter a reservation that it considered itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" is coterminous with cruel and unusual treatment or punishment prohibited by 5th, 8th and/or 14th Amendments.

c. Convention on the Rights of the Child, arts. 3,19, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 recognizes that children are entitled to special care and assistance and that the best interests of the child must be a primary consideration. Youth have the right to protection from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Article 19 protects youth from private acts of violence and harassment as well as from acts committed by state agents. The United States has signed, but it has not ratified the convention.

2. Use of ICCPR

   a. ICCPR does not create a separate cause of action in U.S. courts for violations of its provisions because the U.S. Senate explicitly stated its provisions were not self-executing. 138 Cong. Rec. S4781, S4784 (daily ed. Apr. 2, 1992).

   b. However, because the U.S. is a signatory, the ICCPR does create binding international obligations for the U.S. with regard to other countries and the international community.

   c. Even if a treaty is not self-executing, a rule of judicial construction states that where fairly possible, state and federal law should be interpreted in accordance with international obligations of the United States including obligations arising under treaties to which the U.S. is a party. United States v. P.L.O., 695 F.Supp. 1456 (S.D.N.Y. 1988).

   d. Restatement (Third) of Foreign Relations Law of the United States §115, provides that: "[e]ven a non-self-executing agreement of the United States . . . may sometimes be held to be federal policy superseding State law or policy."

   e. And, even if a treaty is non-self-executing, courts of the United States are not prevented from seeking guidance from it in interpreting United States law.

III. Possible Proactive Steps to Avoid Legal Action

The 1992 recommendations made by Governor's Commission on Gay and Lesbian Youth in Massachusetts are still the most concise statement of what school districts and individual school buildings need to do relative to ensuring the safety and improving the lives of GLBT, QT, and GV children in their care. In a somewhat adapted form, these include the following steps:

Enact, disseminate, and vigorously enforce district and school policies that protect GLBT, Q and GV students [and staff] from harassment, violence, and discrimination;

Train all school personnel, but especially administrators, teachers, and counselors, and provide them ongoing professional development experiences in issues relevant to the needs and problems of GLBT, QT and GV youth, including protecting them from harassment and violence as well as drop-out and suicide prevention;

Establish and nurture school-based support groups on the "Gay-Straight Alliance" model;

Provide gay-positive, school-based counseling for GLBT, QT and GV youth and their families;

Develop and publicize library collections which provide accurate information on gay and lesbian people; and

Develop curriculum that incorporates gay and lesbian themes and subject matter into all disciplines in an age-appropriate fashion.

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Other Resources:

http://www.glsen.org = GLSEN, the Gay, Lesbian, Straight Education Network, offers training programs and modules, professional development manuals, curriculum guides, videos, readings and other resources for educators, school and district officials, parents, and students.

www.safeschools.org = The Safe Schools Coalition of Washington offers empirical studies of sexual orientation & gender identity-based harassment in schools, legislative updates, recommendations and strategies for addressing sexual orientation and gender identity-based harassment and violence in schools, including model policies, training manuals, books, videos, and other resources, hot links to crisis services, other safe school coalitions across the country as well as national and international organizations. The WA Safe School Coalition also offers Practical Guides for all involved, e.g., an administrator's guiding for handling, an educator's guide for intervening, an educator's guide for preventing, a parent's guide for surviving, and a student's guide for surviving anti-gay harassment and physical/sexual assault.

http://www.lambda.org = Lambda Community Services provides a variety services: Speakers Bureau, hot lines (hate crimes, teen help,) Anti-violence Project, and a Crisis Action Team, as well as legal information and assistance to victims through the Lambda Legal Defense and Education Fund.

GETTING IT RIGHT ON RELIGION IN EDUCATION: A PRAYER ANSWERED

The Establishment Clause is Outnumbered: Two to One

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
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The Establishment Clause is Outnumbered: Two to One

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November 2001

-- … One Nation, Under God, Indivisible, With Liberty and Justice For All

When the unfathomable happened on September 11, 2001, it brought this nation to its flag and to its knees.

The Star-Spangled Banner waved from cars, buildings, construction cranes and apparel. The surge of patriotism that swelled to a crescendo that day underscored to people that democracy equals freedom and yet, our way of life is fragile still some 200-plus years later.

As the day went on, the attackers brought the country to a kneeling position – not by extinguishing our military might or can-do spirit, but rather by causing a resurgence of religious observance, both within individuals and as a shared societal value, morality and faith held by citizens of the U.S.A. Afterward, church attendance spiked upward, prayer became a comforting ritual for many, and public figures – including the president of the United States – became fond of the song and the phrase "God Bless America."

I say all this because there is common agreement that the Constitution, and hence its interpretation by the nine Justices of the U.S. Supreme Court, cannot be fully divorced from the times in which we live. Indeed even before that fateful day, the Court was moving steadily to the right and increasingly toward permitting a more cozy association between religion and public life. When tragedy struck, the Justices themselves were hustled out of the storied marble halls on the Hill and whisked away to a safe house. The American people (and perhaps the justices, too) are likely to see this incident as justification for the need to restore character and morality to supplement the actions of government, and will view religion as the sweet elixir to achieve that balance. How ironic, then, that the people who perpetrated these heinous acts were motivated by religious fervor.

This paper posits that the fulcrum that balances the First Amendment religion clauses is being tipped in toward a greater role for religion in government life. This is happening through a series of decisions by federal district courts and circuit courts, following the lead of the Supreme Court of the United States. Over the last 10 years there has been a slow erosion of Establishment Clause jurisprudence that demands strict separation, with the high water mark being when *Agostini v. Felton* called into question the methods necessary to judge when a constitutional violation has occurred. The unfortunate Establishment Clause is being beat upon because it is outnumbered two to one. In addition to the resurgence of free exercise jurisprudence as a counterweight, those who favor religion have also ridden the fellow First Amendment horse of free speech to great effect.

The result is that between a more conservative High Court which tends to accommodate ties between religion and government, a more conservative federal judiciary, along with the events of the day, religion – particularly the dominant Judeo-Christian outlook – will become more of a daily reality in our public institutions, particularly where the battle is usually joined: public schools.

The Most Powerful Comma

It has been called the most powerful comma in the English language because it separates two towering, conflicting ideals that represent our most fervent hope and reflect our country's tolerant beginnings. It comes 10 words into the 16-word clause, but the lack of numerical symmetry means nothing because the two titans are precisely equal: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The words are the first proclamation within the First Amendment to the Constitution and are in essence the opening salvo for the Bill of Rights that follow along afterward. In short, and not doing it full justice, the words to the left of the comma stand for the proposition that government may not take actions that seem to favor or sponsor any single denomination or even religion in general. Conversely, the last six words on free exercise stress that individuals have a right to observe their religion without interference, even under some circumstances when government is simply trying to preserve its neutrality.

The statement sets up a healthy but uncomfortable tension colloquially referred to as freedom *from* religion and freedom *of* religion. Then comes yet another layer in the next phrase of the First Amendment: "or abridging the freedom of speech" which gives individuals wide latitude to convey their beliefs (within certain parameters) without prohibition by government.

Taken together, the trio can be used by justices or judges to envision either more or fewer connections between religious believers and the actions and teaching that occur in the K-12 environment. Even a cursory historical look at legal decisions proves that out. My sense is that we are about to enter a period of sustained pre-eminence for free exercise and free speech and see concerns connected to the Establishment Clause diminish.

Some examples are the best way to demonstrate this trend.

Agostini v. Felton, 521 U.S. 203 (1997)

This case explicitly overturned *Aguilar v. Felton*, 473 U.S. 402 (1985), a U.S. Supreme Court decision stating that New York City was wrong when it paid public school teachers to provide remedial education inside parochial schools. The Court then found that the practice caused an excessive entanglement between school districts and religion and was thus a violation of the Establishment Clause. The Court noted that teachers on the public payroll would have to be closely monitored to ensure no inculcation of religion occurred.

The justices in *Agostini* disagreed, holding that such instruction was permissible, as long as there were built-in safeguards that help to ensure a proper distance is maintained. This was a radical and uncommon reversal of a case only 12 years old and with profound implications for First Amendment religion principles. Many commentators believe that the Court was simply engaging in political vote counting – and because there were enough justices to overturn *Aguilar*, it did. The Court justified it by saying that the *Aguilar* outcome would undoubtedly be different under "current Establishment Clause law" and that to continue to let it stand would work a "manifest injustice."

Even more distressing, perhaps, is the impact of this decision on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the landmark case in Establishment Clause jurisprudence that sets out a three-part test for detecting when an Establishment Clause violation occurs. It asks whether the challenged program has a secular purpose; whether it advances or inhibits religion in its primary purpose or effect; and whether it causes an excessive entanglement with religion. Each question is to be delved into in order, independently and in-depth. If the connection with religion is too much at any one question, a constitutional violation has occurred and there is no need to go further.

The 5-4 *Agostini* decision cast aspersions on *Lemon* and perhaps even developed a new way of evaluating Establishment Clause violations. Although *Lemon* was not explicitly overturned on this occasion and still stands as good law, it was on the decline in recent years. The *Agostini* decision surely put school lawyers in a mindset of discussing "Lemonade" , "Lemon-esq", and "Twist of Lemon" as the approach when dealing with this issue day-to-day and when considering how to defend against litigation.

The test as developed by Justice Sandra Day O'Connor would be much looser in its scrutiny and less probing in its scope. Her three-part test would ask: Does the program result in governmental indoctrination; does it define its recipients by reference to religion; or does it create an excessive entanglement.

At bottom, such a test eliminates the careful examination of purpose or motivation behind the program or practice. It is concerned not about coercion or discomfort on the part of the listener, but rather with whether indoctrination occurs. Advancing religion in its primary effect as deemed by *Lemon* as unconstitutional is of no consequence to Justice O'Connor, who takes a literal view of whether it defines recipients by reference to religion. Last, while she maintains the excessive entanglement prong, she gives it a different definition.

Here are her words, with citations omitted,

As discussed previously, the Court's finding of "excessive" entanglement in Aguilar rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness."

"Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus.

"Further, the assumption underlying the first consideration has been undermined. In Aguilar, the Court presumed that full time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required.

"There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here."

Those words are helpful in telling what excessive entanglement is not, but Justice O'Connor has failed to give a good definition of what entanglement is, either in that decision or since. That leaves broad opportunities for involvement and collaborations that would not be declared "excessive."

Thus marked a decline in the Establishment Clause that continues today.

Free Exercise

While Establishment Clause goes down, the Free Exercise Clause is on the upswing. Usually, when invoking this principle, courts talked about a "hostility toward religion" or "accommodation of religion" and evince a sincere desire to be reasonable. In doing so, judges portray themselves as maintaining the delicate balance needed to protect constitutional liberties. Several examples provide proof:

Adler v. Duval 266 F.3d 1070 (11th Cir. 2000); 250 F.3d 1330 (11th Cir.), *petition for cert filed* (Aug. 8, 2001).

This case involves the policy of a Florida school district that permits a student to make any remarks he or she chooses at graduation ceremonies. In essence, the question of whether a student-initiated prayer at graduation is permissible. The 11th Circuit found the practice acceptable under the Constitution, and re-affirmed that decision *en banc* later after the Court had issued *Santa Fe Independent School District v.* Doe, 530 U.S. 290 (2000) forbidding school-sponsored, student-led prayer at football games in a Texas case. A petition for *certiorari* is pending with the U.S. Supreme Court and as of this writing justices have not decided whether to hear the case.

The court observed that it would be impossible to say that the policy is facially unconstitutional without effectively banning all religious speech at graduation – which would go too far.

The Court wrote, "But at the core of Establishment Clause jurisprudence is the notion that the state may not favor, endorse, or oppose the propagation of religious doctrine by its citizens. In this case, the absence of state involvement in each of the central decisions--whether a graduation message will be delivered, who may speak, and what the content of the speech may be--insulates the School Board's policy from constitutional infirmity on its face."

The 11th Circuit then broaches the accommodation principle. "In one sense, the policy can be analogized to a line of open forum cases in which the Supreme Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." And the hostility idea is quick behind, "And it is worth emphasizing that while the state must be neutral and cannot advance or endorse religion, similarly, it need not, indeed it cannot, act in a hostile manner in the face of private religious speech publicly uttered."

Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001), *petition for cert. filed* (August 31, 2001)

This case involves a challenge by the American Civil Liberties Union (ACLU) against a Virginia statute that requires a minute of silence daily in every public school. It stated that the purpose was so that "each pupil may, in exercise of his or her individual choice, meditate, pray, or engage in any other silent activity…." The 4th Circuit found the law constitutional and the ACLU has filed a petition for *cert.* with the U.S. Supreme Court. As of this writing, the Court had not decided whether to accept the case.

But the opinion at the 4th Circuit is a good illustration of references to the Free Exercise Clause being used to trump the Establishment Clause. The decision in this case is in marked contrast to *Wallace v. Jaffree*, 472 U.S. 38 (1985) a similar Alabama statute that was held unconstitutional. The 4th Circuit observed that *Wallace* "was based on the unique facts presented in that litigation and that its decision did not categorically prohibit moment-of-silence statutes. Quoting the U.S. Supreme Court in the *Wallace* case, the 4th Circuit Court found that enacting a statute solely for a religious purpose is "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."

While both *Wallace* and *Brown* used *Lemon v. Kurtzman* as a starting point, the different conclusions can very much be traced to the influence of allowing free expression of religion. The court in *Brown* stated that "…just as this short period of quiet serves the religious interests of those students who wish to pray silently, it serves the secular interests of those who do not wishes to do so. …. Indeed, to require a ban on the use of religiously related terms would manifest a hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution."

Free Speech

Good News v. Milford Central School District (2001)

A key struggle for dominance between Free Speech and the Establishment Clause took place last term in the *Good News Club v. Milford* case. At issue was the ability of an outside group that actively preaches the bible and proselytizes to have access to classroom space for meetings immediately after the school day.

Using strong Free Speech language and brushing aside the Establishment Clause, Justice Clarence Thomas affirmed the right of the religious club to be on school grounds on the same basis as any other club or activity. The Court called any other approach "viewpoint discrimination" and said the school district had not raised a valid Establishment Clause claim.

Here's how Thomas characterized the clash, "The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."

Then he adds the exclamation mark, "we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." To me that signals a new limitation on the use of Establishment Clause in its current form and certainly it won't be expanded to accommodate new situations.

The Kettle Moraine School Board in Wales, Wisconsin & the Houghton-Portage Township School District in Houghton, Mich.

The Kettle Moraine School District, facing a challenge to its policy regarding the distribution of religious material on campus, decided in September of 2001 to change their approach rather than face a free speech claim in court. In this case, the parents of a second-grader sued the district for not letting their daughter hand out Valentine's Day cards containing religious messages such as "Freely Rely on God" and "Jesus Loves You." The school district feared that permitting that to happen would be tantamount to endorsement and would violate the Establishment Clause. The new policy allows students to distribute religious literature on an equal basis with secular materials but still forbids information that seeks "to market, solicit money, recruit, indoctrinate or convert."

Likewise, the Houghton-Portage Township School District came to the same conclusion last August when faced with a lawsuit by two high school students who wanted to hand out "Student Survival Kits" from the religious group Campus Crusade for Christ." The kits contain a variety of religious paraphernalia, including a Bible and a Christian music compact disc. School officials agreed to allow for the distribution of religious materials as long as it occurred during non-class time.

While the U.S. Supreme Court has not directly ruled on the issue of distribution of religious information in public schools, both instances here are clearly an example of religiously inspired people – and oftentimes the organizations who back them – using the Free Speech clause of the First Amendment as a sword to rip through any Establishment Clause concerns that a school might raise. Also, the fact that both districts settled demonstrates the uncertainty of prevailing in a judicial system that has allowed for more and more religious activities to take place in public settings.

The actions of the Wisconsin and Michigan school districts were probably on target. Take for example the case of *Deboer v. Village of Oak Park*, No. 99-4153, 99-4226 (7th Cir. Sept. 20, 2001). The 7th Circuit struck down a city restriction on assemblies on its properties for a "civic program or activity" when it excludes any event involving religious prayer and worship. The court saw the regulation as impermissible viewpoint discrimination in violation of the First Amendment speech rights of people wanting to speak on religion. In so doing, it cited the *Good News Club* decision as persuasive on this point.

Conclusion

In the future will be interesting to watch as the pendulum swings toward a hallowed place for free expression and free speech and a cloistered spot for the Establishment Clause. If the justices choose, they could use this paradigm to resolve the Cleveland voucher case (*Zelman v. Simmons-Harris*, F.3d 945 (6th Cir), No. 00-1751, *cert. granted*) that they have accepted for argument and decision in the 2001-2002 term. The 6th Circuit found an Establishment Clause violation, mostly because there was no way to ensure that public tax dollars given to religious schools would be used in an exclusively secular way. Justice O'Connor could resurrect her argument about trusting that people (this time religious administrators rather than public servants) act in good faith. Justice Thomas could say that if money is made available to secular private schools then it would be viewpoint discrimination to deny those same funds to religious schools. Chief Justice Rehnquist and Justice Scalia have made clear that they have little patience with Establishment Clause arguments as an impediment to identical treatment and Free Exercise.

The justices seem to be resurrecting the neutrality religion, but instead of it acting as a prohibition on government, it is acting to insist upon accommodation of religion. That's why the seeming sponsorship of football prayer was struck down, but others that seem to infringe on individual or religious organizational speech are upheld.

Within a few months, it seems, we will know if the Establishment Clause is truly outnumbered and perhaps outmoded as a way of restraining and confining religious sentiment in the early part of the 21st Century.

UPDATE OF PART C OF THE IDEA: NEW REGULATIONS, CASES, AND OSEP LETTERS FROM THE PAST YEAR

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Update on Part C of the IDEA:

New Regulations, Cases, and OSEP Letters from the Past Year

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An Overview of IDEA Regulations for the Youngest Children with Special Needs

	Part B	Part C
Eligibility	**34 C.F.R. §300.7** Age 3-21: Disability and need for special education and related services Age 3-9: Developmental delay and need for special eduacation and related services	**34 C.F.R. §303.16** Birth through age two: Experiencing developmental delays or a condition with a high probability of resulting in developmental delay -OR- At State's discretion, at risk of developmental delay
Identification	**34 C.F.R. §300.125** Comprehensive system to identify, locate, and evaluate eligible children	**34 C.F.R. §303.321** Comprehensive system to identify, locate, and evaluate eligible children
Evaluation	**34 C.F.R. §§300.530-300.536** Use of a variety of non-discrimantory evaluation or assessment tools and/or standardized tests Evaluate all areas related to the suspected disability and identify all special education and related service needs Evaluation must be completed before provision of services	**34 C.F.R. §§303.322-303.323** A timely, comprehensive, multidisciplinary evaluation to determine initial and continuing eligibility Family-directed identification of needs to enhance the family's capacity to meet the developmental needs of the child Must be completed with 45 days; an interim IFSP can be developed if exceptional circumstances delay completion of evaluation
Placement	**34 C.F.R. §300.550** Special education and related services in the least restrictive environment	**34 C.F.R. §303.12(b)** Early intervention services in natural environments
Services	**34 C.F.R. §300.13** Free and appropriate public education to children with disabilities through the provision of special education and related services	**34 C.F.R. §303.12** Early intervention services to eligible children

Service Delivery	**34 C.F.R. §§300.340-300.350** Based on an Individualized Education Program to meet the needs of the child Includes: present levels of performance; measurable annual goals; special education and related services; supplementary aids and services; and modifications or supports for school personnel	**34 C.F.R. §§303.340-303.346** Based on an Individidal Family Service Plan to meet the needs of the child and child's family Includes: child's status; family information; expected outcomes; and the specific early intervention services Must include the name of a service coordinator who will be responsible for the implementation of the IFSP and coordination with other agencies and persons

NPRM

On September 5, 2000, the Secretary of Education invited comments to the Notice of Proposed Rule Making (NMPR) on the Early Intervention Program for Infants and Toddlers with Disabilities, 34 CFR Part 303. To be considered by the Secretary, comments were to be received by December 4, 2000 and included proposed revisions to current Part C regulations. Approximately two-thirds of the existing regulations were not part of the revisions suggested in the NPRM. The proposed changes related to:

- Natural environments
- State financing of early intervention services and the use of insurance
- Other areas including -
  - service coordination
  - two day timeline provision in the child find requirements
  - IFSP
  - transition out of Part C

The NPRM also dealt with the disposition of explanatory notes and suggested that notes be removed from the final regulations by:

- incorporating, into the text of the regulations, the substance of any note that should be a requirement
- adding, as part of the analysis of comments and changes, information from any note that provides clarifying information or useful guidance
- deleting any note that is no longer relevant

Despite comments and suggestions from individuals and organizations prior to the December deadline, the national elections in November 2000, and the subsequent change in presidential administrations, have resulted in a delay in the acceptance and/or implementation of any changes in the Part C regulations. The Part C federal regulations remain as they existed at the time of the NPRM over one year ago.

UPDATE: WHAT'S NEW SINCE ELA 2000

"Connected" to Part C ---

Letter to Thompson, 4 ECLPR 236 (OSEP 2000).

Issue: Natural Environments

OSEP responded to an inquiry regarding the Part C requirement that early intervention services be provided in a natural environment. The letter reiterated the requirements that "to the maximum extent appropriate to the needs of the child, early intervention services are to be provided in natural environments, including the home and community settings in which children without disabilities participate." The Part C regulations offer a definition of natural environments as settings which are natural or normal for the child's same age peers without disability. The letter addressed the requirement that states develop a policy on natural environments and justify in the IFSP when a child does not receive early intervention in a natural environment. Parent education, an important element of Part C early intervention services, may be provided in settings other than natural environments as long as there are multiple opportunities available for parents of children with disabilities to interact with each other.

Letter to Nelson, 33 IDELR 187 (OSEP 2000).

Issue: Funding for Early Intervention Services

OSEP responded to an inquiry concerning the coordination of Medicaid, Part C, and private insurance to pay for early intervention services. Several years ago, OSEP proposed a rule that would have prohibited a Part C lead agency from using private insurance to pay for an early intervention service included in the IFSP if the use of this insurance would incur a financial burden on the parents. The Part C final regulations issued in 1999 did not include this insurance provision as the comments received by the Department of Education indicated that additional examination of the impact was necessary prior to implementation. OSEP then agreed to accept any reasonable interpretation provided by a state regarding the use of private insurance as long as parents would not incur personal financial loss, however, parents could agree to the use of their insurance even when its use results in financial loss. In such cases, private insurance may be used to support the provision of early intervention services. On the other hand, states are required to ensure that the inability of parents to pay for early intervention services will not result in denying services to the child or family.

Letter to Goings, 34 IDELR 120 (OSEP 2000).

Issue: Funding for Early Intervention Services – Tribal entities

OSEP responded to an inquiry regarding the obligation of the Oglala Sioux Tribe to provide early intervention and special education services to children 0 to 5 under Parts B and C of IDEA. Tribal entities may provide early intervention services to children under age 3 by using funds directly provided directly to the tribe or by acting in the capacity of a service provider or contractor for the state's lead agency. Whether the tribe receives funds directly from the Bureau of Indian Affairs or from the state, the tribe is required to comply with all the requirement of Part C as part of the agreement in receipt of federal funds. In order to remain eligible for other federal monies, the tribe must file a biennial report with the Secretary of the Interior describing all the activities accomplished with the money provided. This must include information about how many children were receiving services and an estimate of the number of children needing services in the 2 years following the reporting year.

Northwest Regional Educ. Serv. Dist., 4 ECLPR 231 (SEA OR 2000).

Issue: Tuition Reimbursement

The school district prevailed and parents were denied reimbursement for a unilateral private placement for their 5-year-old child with autism. The independent hearing officer held that the IFSPs offered by the school district provided FAPE and contained appropriate goals and objectives. The goals and objectives were updated when the child made progress, and many were similar to those in the private program selected by the parents. The parents had contended that the IFSPs offered by the school district over a three year period contained several IDEA violations. These included claims that the district did not provide services in a natural environment, the IFSPs lacked appropriate goals, the bus ride was too long, and the child's safety would have been at risk in one of the proposed placements.

The district's IFSP, which included placement half-time in a self-contained classroom, and half-time at home, satisfied the natural environment requirement. The goals and objectives were appropriate, the bus ride was reasonable, and there was no founded support for the parents' claim that an alternative placement option did not actually exist.

Dekalb County Sch. Sys., 33 IDELR 49 (SEA GA 2000).

Issue: Stay-put during transition out of Part C

A state agency had been funding placement in a private autism resource center, but when the child turned 3 years old that funding was terminated. Subsequently, the school district proposed another special education placement, and the parents rejected the proposed alternative. The parents paid for the child to remain in the private placement during the due process procedures. The parents then sought a stay-put order and reimbursement for the private placement during this period. The administrative law judge determined that the child was entitled to stay-put in the private program since that was the last agreed upon placement between the school district and the parents. Even though the proposed placement was rejected by the parents, stay-put would allow the child to continue to receive special education services. Therefore, the state was required to reimburse the parents for the costs of the private program incurred while they were pursuing due process.

"Related" to Part C ---

Celina (TX) Indep. Sch. Dist., 34 IDELR 41 (OCR 2000).

Issue: Child Find procedures

A complaint lodged against the school district included a number of items related to the identification, placement, and services provided to children with disabilities. OCR found no evidence to support the charges made in the complaint. The main component of the complaint focused on the district's ability to identify and locate children with disabilities. OCR found that the district had appropriate child find procedures that were documented and that included informational programs for the public and tracking of children with disabilities.

Letter to Breaux, 34 IDELR 121 (OSEP 2000).
Issue: Use of Part B funds for playground equipment
OSEP responded to an inquiry regarding the use of Part B funds to purchase playground equipment. OSEP used this opportunity to remind readers that the requirement to provide FAPE guarantees that children with disabilities will participate to the maximum extent appropriate to their needs. This requirement refers to both academic and nonacademic activities, including recess. Therefore, the use of Part B funds to purchase specially designed playground equipment that will allow a child with a disability to participate in activities with nondisabled peers and to receive FAPE in the LRE is allowed as long as the district complies with all other IDEA purchasing requirements. Each purchase should be considered on a case-by-case basis to determine whether or not the equipment is necessary to provide FAPE to children with disabilities attending the school.

Orland Sch. Dist., 34 IDELR 191 (SEA IL 2000).
Issue: Tuition reimbursement
Parents of a child with a hearing impairment sought reimbursement for a unilateral private placement in a school restricted to students with hearing impairments. The independent hearing officer held that the placement options offered by the school district offered FAPE in the LRE for this child. These options included half day regular kindergarten with appropriate related services or a private all-day kindergarten with nondisabled peers. Based on the fact that the IEP was properly developed and provided appropriate goals, services, and evaluation measures, and the placement options were considered to be appropriate for the child's needs, the parents' request for reimbursement was denied.

Doe v. Metropolitan Nashville Pub. Schs., 34 IDELR 256 (6th Cir. 2001).
Issue: Child Find
The 6th Circuit upheld the ruling of the lower court that a school district's publicity campaign for identifying, locating, and evaluating children with disabilities met the requirements for child find under the IDEA. The child find plan included distribution of materials all schools in the area, day care centers, nursery schools, hospitals, and medical personnel who would be more likely to encounter children in need of special education (such as pediatricians and psychologists). The suit, claiming the district did not do enough to locate and evaluate their son and seeking reimbursement for their unilateral private placement, was brought by parents of a child who never attended a school in the district.

The child was placed in an out-of-state residential school at age 12. At that time, his parents did not request an evaluation of his learning problems or inform the district of their decision to place their child out of state. Approximately, one year later, the parents asked the district to conduct an evaluation. It took the school district

6months to evaluate the child, however this was not seen as unreasonable by the court based on the need to obtain information from the private school located in another state. Following the evaluation that determined the child's eligibility, the parents were offered a special education program for their child including placement in a local public school. The parents contended that the school district should have provided them with individualized information on the IDEA mailed to them even when their child attended an out-of-state private school and had not previously been identified. The court acknowledged that it would not be practical to expect the school district to pursue parents of unilaterally enrolled private school students who chose not to act upon information already available to them through publicity campaigns that complied with IDEA.

Lincoln Intermediate Unit No. 12, 34 IDELR 305 (SEA PA 2001).
Issue: Appropriate education
Numerous attempts were made by the school district to offer an IEP that would be acceptable to the parents of a preschool child with a profound hearing loss who had previously been on an IFSP. The parents rejected the IEP and initiated due process. Subsequently, the school district proposed yet another IEP that included 14 goals and 66 objectives. This was still not satisfactory to the parents who requested additional goals and objectives, a behavioral intervention program (BIP), and extended school year (ESY) services. The impartial hearing officer held that the IEP was both appropriate and offered in a timely fashion. The parents found exception to this ruling and pursued further review by a state review panel (2 tier system). The panel upheld the ruling of the impartial hearing officer, however the panel did modify the earlier ruling by requiring the school district to complete a functional behavioral assessment and develop a BIP and to convene the team to conduct an ESY determination.

Smithtown Cent. Sch. Dist., 35 IDELR 53 (SEA NY 2001).
Issue: Tuition reimbursement
The parents of a 5-year-old child were awarded tuition reimbursement when a state review officer determined that the school district did not make FAPE available in a timely manner and the program selected by the parents was, in fact, appropriate for the child. The school district had committed substantive and procedural errors in developing the IEP, and thus the district did not offer FAPE. Meanwhile, the unilateral private placement chosen by the parents accommodated the child's physical and speech disabilities and provided for interaction with nondisabled peers. The development of the district's IEP took place without the participation of the parent or a general education teacher. The IEP did not include a statement of measurable goals for the kindergarten year, and the IEP committee had simply adopted goals suggested for the child in her preschool classes.

EEOC Attacks on School District Early Retirement Plans:
Is your Collective Bargaining Agreement a Time Bomb Waiting to Explode?

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E.E.O.C. ATTACKS ON SCHOOL DISTRICT EARLY RETIREMENT PLANS: IS YOUR COLLECTIVE BARGAINING AGREEMENT A TIME BOMB WAITING TO EXPLODE?

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I. HOW IT ALL BEGAN - HISTORICAL TIME LINE

A. 1967 - Congress passed the Age Discrimination in Employment Act ("ADEA").

1. The ADEA bars an employer from discriminating against any protected individual in the "compensation, terms, conditions, or privileges of employment, because of such individual's age[.]" *29 U.S.C. § 621, et seq.*

2. Original language of ADEA limited the "protected individuals" to those ages 40 to 65.

3. Original language of ADEA (Section 623(f)(2)) allowed different treatment of older employees in the context of a benefit plan, provided the plan was not a subterfuge.

4. U.S. Equal Employment Opportunity Commission ("EEOC") regulations allowed differential treatment in benefit plans, but required proof that reduction in benefits for older workers was justified to offset increased benefit costs for older workers.

B. 1978 - Congress amends to ADEA to forbid involuntary retirement based upon age and expands protected individuals to age 70. *See 29 C.F.R. § 1625.9.*

C. 1980s - Employers and Unions negotiated early retirement incentive plans ("ERIP") in collective bargaining agreements ("CBA") as a "win-win" arrangement. Employers benefitted from reduced costs due to retiring senior members of the Union and, as a result, passed some of those savings on to Union members selecting early retirement. Typical ERIPs offered:

1. Sliding scale payments that reduce with age; and/or

2. Health benefits that terminate at Medicare eligibility.

D. 1986 - Congress passes the Age Discrimination in Employment Act Amendments of 1986 and removes the upper age limit to the group of individuals protected by ADEA (previously, only those age 40 to 70 were protected).

E. 1989 - U.S. Supreme Court rules that the ADEA exempts all provisions of a bona fide employee benefit plan from discrimination prohibition under the ADEA. *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989).

F. 1990 - Congress passed the Older Worker Benefit Protection Act ("OWBPA").

1. ADEA was amended to protect against age discrimination with respect to "all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." *29 U.S.C. § 630(l).*
2. Congress made clear that the age discrimination protection extends to "virtually all employee benefits and benefit plans," S. Rep. No. 101-263, at 5 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1510 (emphasis added), including early retirement plans. *See 29 U.S.C. § 630(l).*
3. ADEA amended to provide that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter." *29 U.S.C. § 623(f)(2)(B)(ii).*
4. ADEA amended to provide that a minimum age for retirement under a "retirement plan" was permissible.

G. 1993/1997 - EEOC commences its attack on ERIPs by filing an action in 1993 against the Crown Point Community School based upon its ERIP.

1. School district ERIP provides for reduced cash benefits (20% reduction each year) for teachers retiring between 60 and 65 (e.g. age 60=80%, age 61=60%, age 62=40%, etc.)
2. In 1997 the Court granted summary judgment for the EEOC finding the ERIP in violation of the ADEA. *EEOC v. Crown Point Community School Corp., 1997 WL 54747 (N.D. Ind. 1997).*

H. 1998 - Congress passed the Higher Education Amendments of 1998

1. ADEA amended to allow tenured higher education employees to be offered ERIP benefits that "are reduced or eliminated on the basis of age". *29 U.S.C. § 623(m).*
2. Requires tenured higher education ERIPs to be supplemental benefits and that employee has 180 days to elect to retire under ERIP.

I. 1999 - The 7th Circuit Court of Appeals issues a decision undermining many public education cash based ERIPs.

1. Plaintiff represented by American Association of Retired Persons ("AARP")
2. EEOC filed Amicus Curiae briefs
3. The Gary Public School system offered monthly payment to employees who had 15 years of service and reached age 58; benefits ceased at age 62. Between ages 58 and 62, the benefit decreased, with no early retirement incentive given to those

retiring at age 62 or older. Gary Schools had attempted to provide a true incentive for employees to retire "early" by decreasing benefits based on the employees' age at retirement. Despite the voluntary nature of the plan and that the plan was motivated by the employer's genuine desire to save money in light of serious funding problems -- the Seventh Circuit struck down the plan as age discriminatory.

J. 2000 - The 3rd Circuit Court of Appeals issues a decision undermining many public education health benefit ERIPs.

1. Erie County offered health benefits to retirees, but those benefits were reduced when a retiree became eligible for Medicare.
2. EEOC filed Amicus Curiae briefs
3. The Court ruled that Medicare eligibility is a "direct proxy for age" and it is not permissible under the ADEA to use Medicare eligibility to cut off or reduce health benefits, except in narrow circumstances. *Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000).* See below.

K. 2000 - In July of 2000 the EEOC launched a statewide effort in Wisconsin to determine public school compliance with the ADEA in ERIPs.

1. The EEOC (Milwaukee, Wisconsin office) began sending compliance questionnaires, and in some cases, charges of discrimination to virtually all public school districts in State of Wisconsin. Initial inquiries sought copies of collective bargaining agreements containing early retirement provisions related to age, lists of employees who retired within previous two years and explanations as to why ERIP's were adopted.
2. A few districts received rapid responses from EEOC, finding that age-based ERIP's violated the ADEA. Conciliation agreements were attached, demanding District acknowledge discrimination publicly, and seeking double damages and interest for "affected employees." Districts which refused to consent to conciliation agreements were threatened with litigation.
3. Most districts did not receive rapid responses and merely received charges of discrimination, indicating that EEOC believes that their ERIP's violate ADEA. These charges were not accompanied by conciliation agreements and indicated that "no further action is needed at this time."

L. 2000 - On October 3, 2000, EEOC issues guidance on discrimination in employment benefits, including ERIPs under the ADEA. *Section 3, EEOC Compliance Manual (2000).* See below.

M. 2001 - *Lenzo v. School City of East Chicago, 140 F.Supp.2d 947 (N.D. Ind. 2001)* issued summary judgment for employee under ADEA based upon sliding scale cash based ERIP benefits based upon age.

N. 2001 - In July of 2001 the EEOC dismisses charges against school districts that only offer health benefit ERIPs, as opposed to cash based ERIPs.

O. 2001 - On July 18, 2001, the Teacher Voluntary Early Retirement Incentive Act of 2001 was introduced in the U.S. House of Representatives.

    1. Adds local education agencies to the exemption created by the Higher Education Amendments of 1998.
    2. Adds provision allowing ERIP benefits to cease upon eligibility for Medicare without violating ADEA

P. 2001 - On August 20, 2001, EEOC rescinds the "Health Benefits" section of the new guidance on discrimination in employment benefits.

II. UNION RESPONSE TO EEOC ENFORCEMENT

A. Renouncing the EEOC Position - Wisconsin Education Association Counsel ("WEAC") "The practical problem with the Solon court's approach is that few employers will offer ERIPs unless they provide a meaningful inducement to older, more expensive workers to leave their employment earlier than they would have without the incentive program.. To the extent ERIPs are seen as a benefit to older workers, Solon may kill the goose producing the golden retirement nest egg. Indeed, even Solon itself recognizes the practical difficulties with its approach:

> Finally, Gary Schools suggests that the plaintiffs have been given a windfall by having been awarded the benefits (or the right to receive the benefits) offered by the ERIPs without having to retire at the age specified by the plans. In effect, the plaintiffs' victory has transformed the early retirement incentives into severance payments made to all employees upon retirement. That argument has some intuitive appeal. None of the plaintiffs who testified, for example, indicated that she retired sooner than she otherwise planned or was prepared to do. There is no way to know on this record, then, whether any of the plaintiffs 'earned' the incentives by retiring 'early.' That may simply be the price Gary Schools has to pay, however, for establishing an early retirement plan which turns on the employee's age.

The authors contend that the Solon employer's argument is not only "intuitively appealing," it is consistent with the goals of the ADEA and central to the concept of an ERIP. Indeed, the authors argue that Solon was not only wrongly decided, but in fact will work to the detriment of the very workers it sought to protect. However, the authors' criticism of Karlen and Solon is tempered with the realization that these decisions were triggered by the prevailing precedent's inability to articulate a convincing rationale for why ERIPs should be allowed to tie benefits to an employee's age."

VanSistine and Meredith, The Legality of Early Retirement Incentive Plans: Can Quantum Physics Help Resolve the Current Uncertainty?, 84 Marq.L.Rev. 587 (2001).

B. At the Bargaining Table

Memo circulated by WEAC to teacher union bargaining teams disagreed with the 7th Circuit decision in Solon, but indicated that WEAC had "reason to believe that the EEOC's position may ultimately help locals bargain better retirement packages."

C. EEOC Position on Union Involvement

EEOC verbally indicated that any unions not willing to enter into good faith negotiations with the school districts would also become subject of the EEOC charge and would also be subjected to litigation.

III. POTENTIAL LIABILITY FOR ERIP DISCRIMINATION

A. The ADEA provides for the following damages, available to prevailing plaintiffs:
    1. Lost Compensation
    2. Double Damages (if willful violation)
    3. Attorneys' Fees

B. EEOC Position in Wisconsin
    1. Agreed not to seek double damages or attorneys fees.

C. EEOC Pursuit of Claims for Individuals Limited
    1. "The distinctive enforcement scheme of the ADEA prohibits the EEOC from obtaining monetary relief for individuals who cannot obtain that relief themselves because they have not filed timely charges." *EEOC v. North Gibson Sch. Corp., ___ F.3d ___, 2001 WL 1083940 (7th Cir. 2001)*
    2. Timely charges are based "on the date on which it becomes clear that the employee will retire pursuant to the terms of the discriminatory plan, regardless of whether he continues to work past that date."
    3. 180 day or 300 day rule. *29 C.F.R. § 1626.7*

IV. UNEQUAL CASH-BASED BENEFIT ERIP SOLUTIONS

A. Plans "consistent with the relevant purpose or purposes of" the ADEA

"Under this exemption, employers may structure their ERIs to give all employees above a certain age:

1. a flat dollar amount (e.g., $20,000);
2. additional service-based benefits (e.g., $1,000 multiplied by the number of years of service);
3. a percentage of salary;
4. flat dollar increases in pension benefits (e.g., $200 per month);
5. percentage increases in pension benefits (e.g., 20%);
6. imputed years of service and/or age (e.g., adding 5 extra years of service and/or age for pension purposes)" *Section 3, EEOC Compliance Manual (2000)*

B. Social Security Supplements.

"An employer may offer an ERI that, for persons who are not yet eligible for Social Security retirement benefits, "bridges the gap" between early retirement and Social Security eligibility (generally age 62 for early retirement and age 65 for unreduced Social Security retirement). There are three requirements for a valid Social Security supplement ERI:

1. The supplement must terminate at the age of eligibility for reduced or unreduced Social Security benefits (now ages 62 and 65, respectively);
2. The supplement must be a defined benefit to be paid to the employee; and
3. The amount of the supplement cannot exceed the amount to which an employee would be entitled in Social Security payments at the date on which the supplement terminates (i.e., when the employee turns either age 62 or age 65). .

The amount to which each individual employee will be entitled in Social Security supplements will depend on that individual's work history. Because of the ADEA's focus on the rights of individuals, and because this defense will be satisfied only if older retirees receive no less in total benefits than similarly situated younger employees, the calculation must focus on each younger employee's own Social Security entitlement. It may not be based on an average calculated for a group of employees." *Section 3, EEOC Compliance Manual (2000).*

C. Equal Cost

"Employers may try to demonstrate that lower levels of ERI benefits for older workers are justified by age-based cost considerations -- that is, that they are spending equal amounts on benefits for all of their employees but that those amounts purchase less for older workers.

Because the cost of early retirement benefits does not generally increase with age, this showing is unlikely to be successful." *Section 3, EEOC Compliance Manual (2000).*

D. Subsidized Portion Offset

"Employers may limit ERIs, or pay higher ERI benefits, to younger employees where the benefits are used to bring those who retire early up to the level of an unreduced pension -- that is, to the amount that those employees would receive at normal retirement age. There are limitations on the offset, however:

1. Employee E's total annual pension cannot exceed the pension of a similarly situated older employee who has reached normal retirement age.
2. The ERI benefit must be provided as part of a defined benefit pension plan.
3. The plan must offer the same terms to older that it does to younger employees eligible for the ERI." *Section 3, EEOC Compliance Manual (2000).*

E. Legislative Fix

1. Teacher Voluntary Early Retirement Incentive Act of 2001

V. UNEQUAL HEALTH BENEFIT ERIP SOLUTIONS

A. EEOC is reevaluating its position. *See August 20, 2001 Order by EEOC.*

B. Consider holding of *Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000).*

C. Medicare "Carve Out" Plan

"...employers may deduct from the health benefits they provide any Medicare benefits for which those retirees are eligible. These plans are generally known as "Medicare carve-out" plans, and will be lawful under the ADEA as long as the total health coverage available to older retirees is at least equal, in type and value, to that offered by the employer for younger retirees. Even though a portion of the benefit for older retirees will be provided by Medicare, the older retirees will receive an equal benefit, and the employer need not cost-justify its lower expenditures for coverage for these individuals." *Rescinded Section 3, EEOC Compliance Manual (2000).*

D. Equal Cost

Employer "...expends an equal cost for benefits for older and younger retirees, and the reductions in benefits for older retirees are actuarially justified." *Rescinded Section 3, EEOC Compliance Manual (2000).*

E. Legislative Fix

1. Teacher Voluntary Early Retirement Incentive Act of 2001

107th CONGRESS

1st Session

H. R. 2558

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

IN THE HOUSE OF REPRESENTATIVES

July 18, 2001

Mr. PETRI (for himself, Mr. KIND, Mr. GREEN of Wisconsin, Mr. SENSENBRENNER, Mr. RYAN of Wisconsin, Ms. BALDWIN, Mr. BARRETT of Wisconsin, Mr. KLECZKA, and Mr. PETERSON of Minnesota) introduced the following bill; which was referred to the Committee on Education and the Workforce

---

A BILL

To amend the Age Discrimination in Employment Act of 1967 with respect to voluntary early retirement benefits and medical benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Teacher Voluntary Early Retirement Incentive Act of 2001.

SEC. 2. GOVERNMENTAL AND HIGHER EDUCATION VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS.

(a) AMENDMENT- Section 4(m) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended to read as follows:

> (m) VOLUNTARY RETIREMENT INCENTIVE PLANS- Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (d) solely because a voluntary early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)), provides for supplemental benefits to an employee that are reduced or eliminated on the basis of the employee's age at the time of such employee's retirement , if--
>
> > (1) the employer does not implement with respect to such employee any age-based reduction or elimination of benefits that are not such supplemental benefits, except as

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permitted by other provisions of this Act;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees, independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) with respect to any plan supplemental benefits for which an employee first becomes eligible after the enactment of Teacher Voluntary Early Retirement Incentive Act of 2001--

> (i) any employee who attains the minimum age and satisfies all non-age based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire, and the plan does not require retirement to occur sooner than 180 days after such election; and
>
> (ii) any employee who is not eligible to receive the maximum supplemental benefits provided under the plan because of the age of such employee at the time of retirement was afforded a reasonable opportunity to receive such maximum benefits at a previous time in such employee's employment.'.

(b) CONSTRUCTION- Except as otherwise provided in section 4(m)(3) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(m)(3)), the amendment made by subsection (a) shall apply in determining whether a voluntary employee early retirement incentive plan maintained by a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) or an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)), was in violation of subsection (a), (b), (c), or (e) of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) after January 1, 1996.

SEC. 3. RETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE AND OTHER GOVERNMENTAL AND EMPLOYER BENEFIT PLANS; VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES.

(a) VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS MAINTAINED BY LOCAL EDUCATIONAL AGENCIES- Section 4(l)(1) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(l)(1)) is amended by adding at the end the following:

> A voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)) which makes payments or supplements as provided in clauses (i) or (ii) of subparagraph (B) in coordination with a defined benefit plan (as defined in Section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35) maintained by a state or an agency thereof shall itself be deemed to constitute a defined benefit plan for purposes of subparagraph (B).'.

(b) RETIREE MEDICAL BENEFITS COORDINATED WITH MEDICARE BENEFITS- Section 4(l) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(l)) is amended by adding to the end the following:

> (4) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employee benefit plan (as defined in section 3 of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)) provides for medical benefits for retired participants that are altered, reduced, or eliminated when the participant is eligible for medical benefits under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.) or an employee benefit plan maintained by a State or an agency thereof.'.

(c) CONSTRUCTION- (1) The amendments made by subsections (a) and (b) shall apply in determining whether a voluntary early retirement incentive plan maintained by a local educational agency (as defined in Section 14101 of the Elementary and Secondary Education Act (20 U.S.C. 8801)) or an employee benefit plan (as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)) providing medical benefits for retired participants, was in violation of subsection (a), (b), (c), or (e) of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) at any time subsequent to January 1, 1996.

(2) No inference may be drawn from the amendment made by subsection (a) as to whether a voluntary early retirement incentive plan maintained by a local educational agency constitutes, or at any time before or after the effective date of subsection (a) constituted, a defined benefit plan (as defined in Section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35)) for any purpose, including section 4 of the Age Discrimination in Employment Act of 1967.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Avenue, Suite 800
Milwaukee, WI 53203-2292
(414) 297-1111
TTY (414) 297-1115
FAX (414) 297-4133 & 3146

July 26, 2000

[redacted] District Administrator
[redacted] School District
[redacted]

Dear Sir/Madam:

This is to inform you that the Equal Employment Opportunity Commission is reviewing the compliance status of your organization under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626 et. seq. (ADEA). Specifically, we are interested in severance, retirement incentive pay, retirement incentive health/dental insurance and related benefits offered to your employees. The attached Request for Information seeks preliminary information necessary for the Commission to discharge its statutory responsibility and to determine if any violations of the ADEA have occurred. Please submit the requested information before **August 9, 2000**. The ADEA provides the EEOC with broad enforcement and investigative powers. This authority is restated at 29 C.F.R. § 1626.4 and 1626.15(a).

Section 1626.4 provides, in relevant part:

> "The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to Sections 6 and 7 of the Act."

Section 1626.15(a) provides as follows:

> "As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, and 216 and 217) (FLSA) and Sections 6 and 7 of this Act (ADEA), the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payments of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA, or both, to obtain appropriate relief."

Your anticipated cooperation is appreciated and we look forward to receiving the requested information before **August 9, 2000**. Your prompt response will enable us to expedite our compliance review and disposition of this matter. All questions or inquiries should be directed to me at **414-297-4056**.

Sincerely,

Pamela A. Bloomer

Pamela Bloomer, Investigator
Milwaukee District Office

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[redacted]
Superintendent
[redacted] School District
[redacted]

RSON FILING CHARGE
E E O C, Milw. Dist. Ofc

THIS PERSON (check one)
☐ CLAIMS TO BE AGGRIEVED
☒ IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION	
Earliest	Most Recent
11/03/1998	11/03/2000

PLACE OF ALLEGED VIOLATION
[redacted] WI

CHARGE NUMBER
[redacted]

NOTICE OF CHARGE OF DISCRIMINATION

(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

☐ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

☒ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

☐ THE AMERICANS WITH DISABILITIES ACT

☐ THE EQUAL PAY ACT (29 U.S.C, SECT. 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☒ No action is required on your part at this time.

2. ☐ Please submit by __________ a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.

3. ☐ Please respond fully by __________ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

EEOC
310 W. Wisconsin Avenue, Suite 800
Milwaukee, WI 53203-2292

Barbara Graner, Investigator
(Commission Representative)

(414) 297-3225
(Telephone Number)

☐ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NAT. ORIGIN ☒ AGE ☐ DISABILITY ☐ RETALIATION ☐ OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION

cc: Thomas N. Shorter, Attorney

DATE	TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL	SIGNATURE
11/03/2000	Chester V. Bailey Director	Chester V. Bailey

EEOC FORM 131 (Rev. 06/92)

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COPY

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office
310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH (414) 297-1111
TDD (414) 297-1115
FAX (414) 297-4133/3146

April 27, 2001

EEOC
vs
[redacted] School District
Charge Number [redacted]

[redacted] School District
ATTN: [redacted]
[redacted]

Dear Sir or Madam:

The U.S. Equal Employment Opportunity Commission (Commission), Milwaukee District Office, previously initiated the charge of discrimination cited above alleging that the provisions of one or more of your collective bargaining agreements relating to early retirement incentive benefits violate the Age Discrimination in Employment Act (ADEA). In the interest of resolving this charge expediently and without further expense, we propose that the parties enter into a settlement agreement that contains the following terms:

1. The school district will negotiate with its unions to revise language in their collective bargaining agreements concerning early retirement incentive benefits to bring them into compliance with the ADEA. The school district will forward a signed copy of the revised collective bargaining agreement to the EEOC's Milwaukee District Office within 10 days after the agreement has been entered into.

2. During the period between the effective date of the settlement agreement and the implementation of a new collective bargaining agreement, school districts will offer all eligible employees early retirement incentive benefits that are the same in all respects (including, but not limited to, amount, rate, plan coverage, and payment options) as those offered employees who retire at the earliest allowable early retirement age under the existing collective bargaining agreement.

3. In consideration for the school district's satisfactory performance of the above, EEOC will terminate its investigation of the directed charge against the school district.

BEST COPY AVAILABLE

I should stress that this agreement applies only to the ADEA *directed* charge initiated by the Milwaukee District Office and will not resolve of any *individual* ADEA charge currently pending or that may be filed in the future.

We have enclosed a draft agreement containing the terms discussed above. If you are amenable to resolving this charge under these terms, please sign and return the agreement. If you have any questions about the draft agreement, please contact either Nancy Sienko at 414-297-1294 or Ruth Wagner at 414-297-1290.

To assist your efforts to draft early retirement incentive plans that are ADEA compliant, we have attached a fact sheet that discusses examples of several types early retirement incentives that the Commission finds acceptable.

Sincerely,

Monty M Johnson

for Chester V. Bailey
District Director

Attachments

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RECEIVED [illegible] 2001

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee District Office

310 West Wisconsin Ave., Suite 800
Milwaukee, WI 53203-2292
PH: (414) 297-1111
TDD: (414) 297-1115
FAX: (414) 297-4133/3146

July 9, 2001

EEOC
vs.
[redacted] School District
Charge Number: [redacted]

[redacted] School District
Attn: [redacted]
[redacted]

Dear Sir/Madam:

The Equal Employment Opportunity Commission (EEOC or Commission) is willing to conciliate the above-referenced charge if your school district agrees to come into compliance with the well-settled law relating to cash-based early retirement incentives. We would conciliate incentives that include, for example, severance, stipends, or cash payments for accrued but unused leave that are reduced or eliminated on the basis of age. Under this conciliation, the Commission will not seek a change to early retirement incentive plans that offer extended health care coverage (generally in the form of a Medicare bridge).

The Commission earlier provided written technical assistance to help facilitate your efforts to design early retirement incentives that comply with the Age Discrimination in Employment Act (ADEA). If you require additional guidance, however, please feel free to contact Monty Johnson, Deputy Director, at (414) 297-1244.

Sincerely,

Chester V. Bailey

Chester V. Bailey,
Director

cc: Quarles & Brady LLP
Attn: Thomas N. Shorter
P. O. Box 2113
Madison, WI 53701-2113

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THE FOURTH AMENDMENT RIGHTS OF STUDENTS: AN EXAMINATION OF DRUG TESTING POLICIES AMONG PUBLIC INDEPENDENT SCHOOL DISTRICTS IN TEXAS

Stacey Edmonson
Assistant Professor, Teacher Education Center
Sam Houston State University
Huntsville, Texas

EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

The Fourth Amendment Rights of Students: An Examination of Drug Testing Policies among Public Independent School Districts in Texas

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1]

Since 1791, the Fourth Amendment to the United States Constitution has protected all persons from unreasonable searches and seizures. Recently, however, this protection has come under scrutiny in one very important context – public schools. Does random, suspicionless drug testing of students constitute an unreasonable search? The courts are currently trying to answer this question.

In 1995, the United States Supreme Court rendered its decision in *Vernonia School District 47J v. Acton*,[2] holding that a school district's random suspicionless drug testing of student athletes as a condition for participation in interscholastic athletics did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. In this particular case, however, the Court noted specific features including student athletes' decreased expectations of privacy, the relative unobtrusiveness of the search procedures, and the seriousness of the need met by this search.[3] Regardless of the procedures, however, this case clearly lowers schools' previous legal search standard[4] of "reasonable suspicion," set forth by the Supreme Court in *New Jersey v. T.L.O*[5] in 1985.

In light of the *Acton* decision, a number of school districts nationwide are implementing mandatory drug testing for students (Hawkins, 1999). As expected, many of these policies have been challenged, with mixed results.[6] These policies are also implemented in response to statistics indicating

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[1] U.S. Const. Amend. IV

[2] 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[3] Id.

[4] J.A. Stefkovich & G.M. O'Brien, *Students' fourth amendment rights and school safety: An urban perspective*, 29 Education and Urban Society 149 (1997).

[5] 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

[6] For example, two appellate courts have upheld random, suspicionless drug testing of students who participate in extracurricular activities not limited to athletics. *See Joy v. Penn-Harris-Madison School Corporation*, 212 F.3d 1052 (7th Cir. 2000) (upholding random drug and alcohol testing of students who participate in extracurricular activities and who drive to and from school; invalidating nicotine testing for students who drive to and from school); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir. (Ark.)); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *rehearing with suggestion for rehearing en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 1998 U.S. LEXIS 4938. Cf. *Earls v. Board of Education of Tecumseh Public School District No. 92*, 242 F.3d 1264, 1275 (10th Cir. 2001) (invalidating random drug testing of all students in extracurricular activities, noting that the evidence of drug use among students subjected to testing was "negligible" and thus did not pass the "nature and immediacy of the governmental concern prong of *Vernonia*); *Willis v. Anderson Community School Corporation*, 158 F.3d 415 (7th Cir. 1998) (invalidating drug testing policy applied to those suspended from school for specified disciplinary infractions; *Theodore v. Delaware Valley School*

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that drug use among students is rising.[7] In fact, many Texas school districts currently have drug testing policies in place, although no official data are kept on this topic.[8] Two particular cases concerning student drug testing policies in Texas deserve special attention.

Gardner v. Tulia Independent School District[9] is the first of the two cases. In 1999, the Tulia Independent School District mandated a policy that required drug testing of all students in grades seven through twelve who participated in any extra-curricular activities. In Tulia, this population included approximately 80% of the total student body. Tulia implemented this policy using the Supreme Court's *Vernonia* decision for guidance. However, while the drug culture among students in *Vernonia* had caused discipline problems of "epidemic proportions,"[10] Tulia had no evidence of serious or widespread student drug use at the time the policy was adopted. Furthermore, the district had no data to support any assertion that students participating in extra-curricular activities were referred for drug-related disciplinary action. In December, 2000, the United States District Court ruled that Tulia's mandatory student drug-testing policy for extra-curricular activity participants was violative of students' fourth amendment protection against unreasonable searches and seizures, as there was neither evidence of a drug problem or drug-related disciplinary problems nor a finding that students occupied safety-sensitive positions within the school district. In rejecting the school district's assertion that 5th Circuit case law[11] gave the district the prerogative to test students even in the absence of a drug problem, the court strongly implied that students did not occupy safety sensitive positions. In fact, the court held that the 5th Circuit's decision in *Brooks v. East Chambers Consolidated Independent School District*[12] was dispositive in its analysis and decision to invalidate Tulia ISD's policy.

District, 761 A.2d 652 (Pa. Cmnwlth. Ct. 2000) (invalidating drug and alcohol testing policy applied to students participating in extracurricular activities and driving to and from school); *Linke v. Northwestern School Corporation*, 734 N.E.2d 252 (Ind. Ct. App. 2000) (invalidating under state constitution suspicionless drug testing policy applied to student-athletes and those participating in specified extra- and co-curricular activities); *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (invalidating suspicionless drug testing policy as applied to members of marching band).

[7] N. Flatt-Moore, *Public schools and urinalysis: Assessing the validity of Indiana Public Schools' student drug testing policies after Vernonia.* 1998 BYU Educ. & L. J. 239.

[8] J. Mackay, *Testy: An Azle mom isn't high on her daughter being drug-tested. Neither is the ACLU.* 25 Texas Monthly 24.

[9] 2000 U.S. Dist. LEXIS 20253 (W.D. Tex.).

[10] *Vernonia School District 47J v. Acton*, infra, 515 U.S. at 648-50, 115 S.Ct. at 2388-89

[11] In *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998), the court upheld a policy in which the school board required random urinalysis drug testing for employee's who occupied "safety sensitive" positions. The court rejected the school district's claim that this decision gave the school district, as the "guardian and tutor of children entrusted to its care," justification to test students without the finding of a drug problem. 2000 U.S. Dist. LEXIS 202535 at *11.

[12] 730 F.Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991). In this case, the court invalidated under the 4th Amendment a school district's policy which required drug testing for all students in grades 7-12 who participated in extracurricular activities. In holding that *Brooks* was not overruled by *Vernonia*, the *Gardner* court noted the factual dissimilarities between the lack of a documented drug problem in Tulia and the evidence of a widespread drug problem in Vernonia. *Gardner*, 2000 U.S. Dist. LEXIS 20253 at *10.

The small Texas panhandle town of Lockney had become "the first school in America to require drug testing for all its sixth through 12th graders."[13] When challenged by a single student's family, the federal district court ruled that the Lockney policy violated students' fourth amendment rights[14]. The Lockney policy required drug testing of all students, each conducted with parental consent. Students who refused to test or who did not obtain parental consent were treated as though they had a positive test result; students in these circumstances were suspended from participation in all extra-curricular activities for 21 days and removal to in-school suspension for at least three days. The Tannahill family was the lone family in the district who refused to consent to the testing for their son, who was a junior high student, despite the fact that Lockney's reported student drug use was actually lower than other students statewide. In March, 2001, the United States District Court ruled that Lockney's policy of requiring urinalysis of all secondary students was unconstitutional according to the fourth amendment.[15] Although Lockney's policy has been struck down in federal district court, this policy does expose the extent to which student drug testing policies are now being implemented.

Currently, the lines between Fourth Amendment protection from unreasonable searches and schools' rights to ensure safety are somewhat blurry. *Vernonia* indicates the districts' right to conduct drug testing of student-athletes in order to protect their security and safety, but, as noted above, other cases indicate that districts certainly do not have unlimited latitude in implementing such policies. A clearer picture of school district policies in Texas will illuminate larger trends in drug testing among school districts in the United States.

This paper offers the comprehensive results from research analyzing the current student drug-testing policies of all 1056 Texas public school districts. The question as to whether random suspicionless drug testing of students will continue to be upheld in light of the Fourth Amendment is one to which the answer remains unknown. With court decisions conflicting on this very question, school administrators, attorneys, and other concerned parties may receive clearer guidance as to the legal ambiguities concerning this issue. In the meantime, this analysis can contribute to an improved understanding of what Texas school districts' policies currently require and how these actions comply with the relevant law.

Methodology

According to the Texas Education Agency (2000), there are currently 1056 independent school districts in the state of Texas. This figure does not include charter school districts or common school districts. One survey, with a postage paid return envelope, was mailed to the superintendent of each public

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[13] A. Belli Gesalman, *Texas duel: Drug tests versus student rights*. 92 Christian Science Monitor 1 (April 18, 2000).

[14] *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919 (W.D. Tex. 2001).

[15] In *Tannahill*, the court also relied heavily on the *Brooks* and *Aubrey* cases, along with *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997), to conclude that the school district had not established a "special need" to undertake the expansive policy either by producing sufficient evidence of a drug problem or by arguing that the "safety sensitive" nature of students and schools justified the policy.

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independent school district in Texas. With the availability of resources through the Texas Education Agency, every public school district in Texas was included in this study.

The survey instrument used in this study was developed with the assistance of an expert panel of educational leadership professors trained in school law. Field testing was conducted to establish content and construct validity. Specifically, this survey sought the following data:

1. Does your school district currently drug test students?
2. Is this student drug testing restricted to certain populations of students?
3. How long has this policy been in place?
4. To your knowledge, has this policy been challenged?
5. If so, in what manner was the policy challenged?
6. If so, what was the outcome of this challenge?
7. If your district does not have a student drug testing policy, do you anticipate that your district will implement one in the future? Why or why not?

Additionally, the survey requested a copy of school board policy FNF, legal and local, which addresses student drug testing issues (Most school district policy manuals in Texas are written in collaboration with the Texas Association of School Boards [http://www.tasb.org]). These data were collected beginning in January, 2001. A second mailing of the survey was conducted in April, 2001, to request responses from those districts who had not yet returned their surveys. All responses were entered into a database for analysis.

Results/Conclusions

Of the 1056 public school districts in Texas, 827 returned their surveys from either the first or second mailing; thus, the response rate for the survey was 78.3%. Of these responses, 658 (20.4%) superintendents indicated that their school district does not currently implement a student drug-testing policy; while 169 (79.5%) respondent school districts do implement some type of student drug-testing policy. These results are displayed in Table 1.

Table 1

Student drug-testing policies in Texas school districts

N=827

Policy in place	Number of districts	Percentage
Yes	169	20.4
No	658	79.5
	827	99.9

Note: Percentages do not sum to 100 due to rounding.

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Table 2 displays the types of student populations subjected to drug testing among the 20% of Texas school districts which have drug testing policies. An examination of the responses to the remaining survey questions presents a number of interesting findings. Students involved in extra-curricular activities make up the most-often tested population, followed by student athletes. Drug-testing policies for these student populations comprise more than three-fourths of all the public school drug-testing policies in Texas. All students are drug-tested in 28 of respondent districts, the same type of policy that was recently invalidated by the district court in *Tannahill*. Of these 28 districts implementing mandatory testing, 13 happen to be state-supported group homes or correctional facilities, including Windham School District, the Texas prison education system. Mandatory drug testing of students in these correctional facilities is legal, but clearly the policies for testing all students currently implemented in the remaining 15 districts are somewhat far-reaching in light of the *Gardner and Tannahill* rulings. Three districts indicated a student testing population of "other," which in all three cases referred to students who drive motor vehicles to or from school. Nine districts indicated that their student drug-testing policies are completely voluntary for students. Thus, more than three-fifths of Texas districts who currently drug test students go beyond what the Supreme Court approved in *Vernonia*.

Table 2

Secondary student populations included in drug-testing policies.

N=169

Student population	Number of districts	Percentage
Student athletes	53	31.4
Students in extra-curricular activities	76	45.0
All students	28	16.6
Other	3	1.8
Voluntary testing only	9	5.3
Total	169	100.1

Note: Percentages do not sum to 100 due to rounding.

Table 3 displays responses from the third question in this survey, which asked districts who did have student drug-testing policies how long that policy had been in place. Available responses included less than one year, one to five years, five to ten years, and more than ten years. Drug testing polices had been in place less than one year for 22 of the 169 districts, or 13% of respondents. The majority of policies had been in place for one to five years, which comprised 71.6% of the results, or 121 districts. Nine districts, or 5.3%, have policies that have been in place for five to ten years. Worth noting is the fact that of the 16 districts with policies over 10 years old, 12 of these schools are state-supported correctional facilities

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or homes. One district failed to indicate how long their policy had been in place. It is clear that the implementation of drug-testing policies in Texas school districts proliferated as a result of the *Vernonia* decision.

Table 3

Years of implementation of drug-testing policies.

N=169

Number of years	Number of districts	Percentage
Less than one	22	13.0
One to five	121	71.6
Five to ten	9	5.4
More than ten	16	9.5
No response	1	
Total	169	100.0

Perhaps the most interesting question on the survey was question four, which asked districts that have a student drug-testing policy if said policy had ever been challenged. These responses are displayed in Table 4. A few districts responded that parents had questioned the policy or even taken complaints to the school board, but only four districts out of 169 positive responses indicated that their policy had been legally challenged. These four districts represent a mere 2.4% of drug testing policies in Texas schools that have been challenged in the courts. Of these four districts, two failed to offer any explanation of their challenge. The remaining two districts whose policies had been challenged were currently awaiting court decisions. Table 4 displays the data gathered for question 4.

Table 4

Student drug-testing policies that have been challenged

N=169

Policy challenged	Number of districts	Percentage
Yes	4	2.4
No	165	97.6
Total	169	100.0

The final question of the survey was directed to those districts who do not currently have a student drug testing program in place. This question asked if the district anticipated implementing such a policy in the future. Surprisingly, 69 districts (of 658 districts with no such current policy) expressed that they do plan to implement such a policy in the future. Thus 10.5% of districts in Texas that are currently not drug testing students plan to do so at a later date. In light of the two Texas school policies in Lockney and Tulia that have recently been struck down by federal courts, 10.5% may be considered a seemingly high percentage.

Table 5

Student drug-testing policies planned for future implementation.

N=658

Policy planned for future	Number of districts	Percentage
Yes	69	10.5
No	589	89.5
Total	658	100.0

Individual responses generated by the surveys also yielded a variety of unique responses not specifically asked for by the survey questions. For example, one district indicated that their drug testing procedures were highly unique because they tested using hair samples rather than urinalysis. Given that the obtrusiveness of the search procedures was an important component of Vernonia and most other student drug-testing cases, this alternative approach to urinalysis is quite interesting. Another interesting remark was made on one survey explaining that their student drug-testing policy was spelled out in the school's athletic code only; no procedures or guidelines appear in district policy. Students are subjected to testing if there is a suspicion of drug use; no testing is conducted regularly or randomly. Such a "policy" comports more with *TLO*, and might not even be considered a policy in the tightest sense of the term. Future research on these and other unique qualities of the survey results should be conducted. Likewise, results of the survey data above will be broken down according to the size of respondent districts – do student drug testing policies occur more often in larger or smaller districts, in urban or rural locations, in a certain geographic area of the state?

As the data gathered for this study indicate, student drug testing policies are not uncommon in Texas public schools. With recent decisions in the *Tulia* and *Lockney* cases favoring students' rights over schools' power to require such testing, challenges of additional school policies seem likely. Clearly the courts are indicating that school districts must have fairly compelling reasons to infringe upon students fourth amendment rights. Important to note is the fact that the challenges these districts are beginning to face indicate an apparent trend by the courts to reign in school districts who are taking *Vernonia* as a license to implement expansive policies.

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CHARTER SCHOOLS AND VOUCHERS

Student Access to Charter Schools: Which States Foster Greater Equality?

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Are Private Entities Operating Charter and Voucher Schools State Actors for Purposes of Observing Federal Constitutional Rights?

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Student Access to Charter Schools: Which States Foster Greater Equality?

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STUDENT ACCESS TO CHARTER SCHOOLS: WHICH STATES FOSTER GREATER EQUALITY?

I. Introduction

A. Charter schools represent one of several public school choice options and are typically configured to facilitate greater parental involvement.

B. An early concern about charter schools was that they would be elitist schools that would lure the best and brightest students away from traditional public schools and serve a lower proportion of students of color than other public schools (Huffman, 1998).

C. This concern has been echoed by critics who fear that limited state oversight will result in stratification of public schools by race and class, and by others who have expressed concern regarding racial and ethnic clustering that is occurring at some charter schools (Texas Education Agency, 1998).

D. In addition, research indicates that it is the student population, rather than the school, that affects student learning and that the composition of a school's ethnic and social class impact individual student learning quite significantly (Godwin, Kemerer, & Martinez).

E. An emerging area of concern is whether or not charter schools truly provide equal access to all students, particularly in the areas of student admission and enrollment; geographic requirements or restrictions; student recruitment; student transportation; and family access to information about charter schools.

II. Comparing the Extent to Which Charter School Laws Foster Equality of Student Access to Charter Schools

A. States play a critical role in defining the structure and operation of charter schools by granting them certain authority through state statutes.

B. Do charter schools truly provide equal access to all students? That is a question that the researcher sought to answer through an investigation into the extent to which U.S. charter school statutes address equality of student access.

C. The focus of the investigation was on equal access in the areas of student recruitment, admission and enrollment, transportation, and information dissemination.

D. The investigation was framed by seven research questions:

- Do charter school statutes provide regulation or guidance for ensuring that underrepresented student groups have equal access to charter schools?
- Do charter school statutes provide regulation or guidance in how admission policies should be developed, or what they should include?
- Do charter school statutes require that charter schools designate geographic boundaries in their charters?
- Do charter school statutes allow for denial of admission to certain students?
- What happens if charter school enrollment exceeds capacity?
- Are charter schools required to provide free transportation to students who attend them?
- Is statutory guidance provided to ensure that all families have access to information about the charter school?

E. Data were derived from U.S. charter school statutes for states in which charter school legislation currently exists, and the investigation consisted of an analysis of each state's charter school statute using the seven research questions as the investigative framework.

III. Context

A. The 10th Amendment to the U.S. Constitution reserves education to the states. Therefore, states play a crucial role in providing statutory guidance to local district schools, for this is where local districts derive policy direction, as well as a sense of the national interest.

B. U.S. demographic patterns are changing, especially in terms of the rapidly growing proportion of the non-Caucasian population; and policymakers are now recognizing women and minorities as the major untapped resource in this country.

C. The strength of the nation depends upon an educated population. Therefore, it is in the best interest of the nation to ensure that present imbalances are eradicated so that all children are well educated.

D. The disadvantaged will comprise the majority of the future U.S. population.

E. There is a strong correlation between poverty and race, indicating that in urban centers, racial isolation is compounded by socio-economic class isolation (Levin, 1999, p. 274).

F. Other studies have found that students who attend heavily segregated minority schools are much more likely to be in high poverty schools than students who attend schools whose populations comprise less than 10 percent black and Latino students (Smrekar & Goldring, 1999, p. 10).

G. The trend toward racial and economic isolation is predicted to increase, especially among Latino students (Kemerer, 1998, p. 18).

IV. Key Findings

A. Facilitating Educational Access to Underrepresented Student Groups

1. The overwhelming majority of states' statutes (34 states) provide regulation or guidance for ensuring that underrepresented student groups have access to charter schools.

2. Twelve states (AZ, DE, DC, IL, MA, NM, NY, PA, RI, SC, VA, MI) include statutory provisions that require that charter schools comply with federal and state anti-discrimination and civil rights regulations, while 17 include prohibitions regarding discrimination in charter school admission.

3. A small percentage of statutes (three states) specifically prohibit charter schools from being elitist or fostering segregation. For example, Arkansas requires that charter schools cannot have a segregative effect (Ark. Code Ann. § 6-

10-116(e)(1)), and Hawaii prohibits charter schools that foster elitism (Hawaii Rev. Stat. § 302A-1182(c)(2)).

4. Thirteen states' statutes (CA, CN, FL, KS, LA, NV, NH, NJ, NC, RI, SC, WI and WY) include a requirement that the charter school student population reflect the racial or socio-economic composition of the school district in which the charter school is located, or that efforts must be made to ensure student diversity, while three states (CN, NH and NJ) include statutory provisions to ensure range and diversity among charter schools.

5. Ten states (AZ, CO, DC, IL, LA, MA, NY, NH, NC and WY) include provisions prohibiting discrimination based upon academic/intellectual ability or athletic ability.

6. One state (Minnesota) includes statutory provisions that address dissemination of information to parents and students of underrepresented groups about charter schools and the educational opportunities they provide; and only one (Illinois) includes provisions that address the transportation needs of students who are members of underrepresented groups (Minn. Stat. § 124D.10, subd. 19 (1998); 105 Ill. Comp. Stat. § 5/27A-7(13)).

7. Thirteen states (CO, CN, DE, DC, FL, ID, LA, MI, MO, NV, NY, TX and WY) include statutory provisions to address the needs of at-risk students or students in special circumstances.

B. Admission Policy Guidelines and Requirements

1. Although a quarter of all states (AK, AZ, CO, FL, GA, LA, MN, MO and SC) require that a charter school admit all students who submit a timely application, almost one-third (AK, CN, DE, DC, LA, MA, MN, MO, NH, NJ and OR) permit charter schools to limit student admission based on age,

grade level, the school's area of focus or lottery (in the case of overenrollment).

2. Less than half of states' statutes include admission preference criteria specifically granting preference to returning students, siblings of enrolled students, students who reside within the boundaries of the school district in which the charter school is located (host district), students who reside in a specific geographic area, children of the initial members of the charter school's board of directors, children of charter school employees, students who reside in the attendance area or former attendance area of conversion schools, and at-risk students. Colorado is the only state whose statute provides for admission preference for at-risk students (Colo. Rev. Stat. § 22-30.5-109(2)).
3. Less than half of states' charter school statutes specify student admission criteria that are prohibited, including selection based upon student or parent residence, local pupil expenditures of the district in which the student resides, discrimination, desegregation order, intellectual or athletic ability, disability, achievement and other federally protected criteria.
4. None of the statutes that include provisions regarding admission policies provide regulations or guidelines for how admission policies should be developed.

C. Geographic Boundary Requirements and Restrictions

1. Slightly more than three-eighths (15) of the U. S. charter school statutes reviewed include provisions that address the issue of geographic boundaries.
2. Slightly less than one-fourth (CA, GA, IL, NJ, OR, UT and WY) define the geographic boundaries of charter schools by those of the host district.

3. Slightly more than ten percent of the statutes reviewed either require geographic boundaries or place their designation at the discretion of the charter school. For example, in Texas, open-enrollment charter schools must describe the geographic area to be served by the school (Tx. Educ. Code § 12.111(13)). Similarly, Louisiana's statute stipulates that charters must include a description of the jurisdiction where eligible students will reside or otherwise be eligible to attend the public school in order to be eligible for admission to a charter school (La. Rev. Stat., tit. 17, § 3991(B)(4)).
4. Four states address ethnic, racial or socio-economic balance with respect to the establishment of geographic boundaries. For example, Missouri's statute stipulates that geographic boundaries may be established so long as they conform to state board of education guidelines and do not result in racially or socio-economically isolated schools (Mo. Rev. Stat. Ch. 160, § 160.410.1(1) (1999)).
5. None of the statutes provide regulation or guidance with regard to how the designation of geographic boundaries might be accomplished without violating equal protection rights.

D. Denial of Requests for Admission for Certain Students

1. Four states' statutes (NH, NC, SC and TX) provide for the denial of charter school admission to certain students.
2. None of the statutory provisions deny charter school access to students on the basis of race, ethnicity, creed, color, national origin, gender, age, socio-economic status, or other criteria in violation of federal and state anti-discrimination and civil rights regulations.
3. The only bases for exclusion include suspension, expulsion, documented history of criminal offense, juvenile court

adjudication, or discipline problems specified in statute.

E. Making Admission Decisions When Enrollment Capacity Has Been Reached

1. The majority (23 states) of the statutes reviewed contain some guidance for addressing oversubscription of charter schools, although most do not specifically discuss the use of waiting lists.
2. In all of these (23) statutes, this provision includes the use of a lottery or other random selection process.
3. In addition to this process, 14 states also provide for preference to be given under specified circumstances, including giving preference to siblings of students selected through the random process, currently enrolled students and their siblings, students who reside in the school's attendance zone, state residents and returning students. For example, Arizona, Connecticut and Idaho allow charter schools to give preference to siblings of a student who is selected through a random process when the number of applications exceeds capacity (Ariz. Stat. § 15-184(A); Conn. Gen. Assembly § 10-66bb(d)(8)(D) (1999); Idaho Stat. § 33-5205(3)(i)).
4. In addition to use of a random selection process, Alaska is the only state that also allows for collaboration between charter schools and host districts in providing additional space and faculty in order to accommodate an excess of qualified applicants (AK Stat. § 14.03.265(b)).

F. Student Transportation Guidelines and Requirements

1. A slight majority of U.S. charter school statutes address student transportation in some way, although the specific provisions differ.
2. Kansas' statute requires that transportation will be provided for

low-income students (Kans. Rev. Stat., § 72-1908 (1998)).

3. State funding assistance is provided to charter schools in three states (AZ, ID and MO), and two states (DC and DE) provide for transportation assistance to students. For example, the District of Columbia provides that charter school students are eligible for reduced fares in the public transit system (D.C. Code, ch. 28 § 31-2853.18)).
4. Two states' statutes include a requirement that charter schools describe their plan for providing transportation to students who attend them, as well as their plan for meeting the transportation needs of low-income, at-risk or low-achieving students.

G. Charter School Information Dissemination Policy Guidelines and Requirements

1. Ten states include in their statutes provisions for ensuring that all families have access to information about charter schools and their offerings. Of these states, four (DE, FL, NV and NC) require that entities other than the charter school—specifically, the Department of Education or the State Board of Education—disseminate information about the school.
2. Four states (MI, PA, MN and NH) either place the responsibility with the charter school itself, or with the school in cooperation with other entities. For example, in Pennsylvania, charter schools (as with school districts) are required to adopt policies to assure that parents have access to information about the curriculum, including academic standards to be achieved, instructional materials and assessment techniques (22 Pa. Code § 4.4(d)(i)).
3. One state (Colorado) prohibits local school districts from discriminating against the charter schools in publicizing educational offerings with the district. However, the charter

school must pay for its share of the publicity costs (Colo. Rev. Stat., § 22-30.5-109(6)).

4. One other state (CN) requires that charter schools' admission criteria and procedures ensure effective public information, although it does not include guidance as to how effectiveness may be measured (Conn. Gen. Assembly § 10-66bb(d) (1999)).

V. States Whose Statutes Foster Greater Equality of Student Access to Charter Schools

A. **New Hampshire** – a charter school cannot discriminate against any educationally disabled student (N.H. Rev. Stat. Ann., tit. 15, ch. 194-B:8(1) (1999)); preference is given to a student who meets the admission requirements of a charter school and who is a resident of the host district (N.H. Rev. Stat. Ann., tit. 15, ch. 194-B:2(VIII) (1999)); no public school is obligated to enroll an expelled student (N.H. Rev. Stat. Ann., tit., ch. 194-B:20 (III) (1999)); charter schools must make available information about its curriculum and policies to all persons, parents, and prospective students (N.H. Rev. Stat. Ann., tit. 15, ch. 194-B:2(VI) (1999)).

B. **North Carolina** – a charter school cannot limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, athletic ability, disability, race, creed, gender, national origin, religion, or ancestry (N.C. Gen. Stat., pt. 6A § 115C-238.29F(g)(5)); any child who is qualified for admission to a public school in the state is qualified for admission to a charter school (N.C. Gen. Stat., pt. 6A § 115D-238.29F(g)(1)); notwithstanding any law to the contrary, a charter school may refuse admission to any student who has been expelled or suspended from a public school until the period of suspension or expulsion has expired (N.C. Gen. Stat., pt. 6A § 115C-238.29F(g)(7)); a charter school is required to develop a transportation plan that ensures that transportation is not a barrier to any student who resides in the host district, although transportation does not have to be provided to students who live within one and one-half miles of the school (N.C. Gen. Stat., pt. 6A § 115C-238.29F(h)).

C. **Arizona** – denial of admission to charter schools is prohibited on the basis of all of the following criteria: race, ethnicity, creed, color, national origin, gender, sexual orientation or age (Ariz. Stat. § 15-184(C)).

D. **Colorado** – charter school enrollment must be open to any child who resides within the school district (Colo. Rev. Stat. § 22-30.5-104(3)); charter school applicants must include a description of how the school plans to meet the transportation needs of its students, as well as a plan for addressing the transportation needs of low-income and academically low-achieving students if it plans to provide student transportation (Colo. Rev. Stat. § 22-30.5-109(6)).

E. **Delaware** – charter schools cannot discriminate against any student in the admissions process because of race, creed, color, gender, handicap, or national origin, or because the student's school district of residence has a per-student local expenditure lower than another student seeking admission, or be formed to circumvent court-ordered desegregation plans (Del. Code Unann., ch. 5 § 506(a)(4)-(5) (1999)).

F. **Massachusetts** – if there are more applicants than available spaces in a charter school, an admissions lottery (including all eligible students applying) must be held to fill the slots (Mass. Gen. Laws, ch. 71, § 89(n)); all charter applications must include a statement of equal educational opportunity, which states that charter schools will be open to all students on a space available basis and will not discriminate (Mass. Gen. Laws, ch. 71 § 89(f)(10)).

G. **Michigan** – charter school students are selected via a random selection process, although enrollment priority is given to siblings of enrolled students and those who were enrolled in the immediately preceding school year (Mich. Comp. Laws, act 451 of 1976, ch. 380, § 504(3)); the application for a charter school must include a description of how adequate notice of the creation of a charter school (public school academy) and adequate information regarding the school's admission policy criteria and processes will be provided to the general public (Mich. Rev. Comp. Laws, act 451 of 1976, ch. 380 § 502(3)).

H. **Minnesota** – information dissemination efforts must target low-income families and communities and students of color (Minn. Stat. § 124D.10, subd. 19 (1998)).

I. **Missouri** – a charter school is eligible for transportation state aid and may contract with the local school district or any other entity for the provision of student transportation (Mo. Rev. Stat., ch. 160 § 160.415.6 (1999)); priority is given to applications for charter schools oriented to high-risk students and to the reentry of dropouts into the school system (Mo. Rev. Stat., ch. 160 § 160.405.2(4) (1999)).

J. **New Jersey** – to the maximum extent practicable, the admission policy of a charter school shall see the enrollment of a cross section of the community's school age population, including racial and academic factors (N.J. Perm. Stat. § 18A:36A-8(e));

K. **South Carolina** – the racial composition of a charter school cannot differ from that of the host district by more than 10 percent (S.C. Code of Laws, tit. 59, ch. 40, § 59-40-50(6) (1998)); a charter school cannot limit or deny admission or show preference in admission decisions to any individual or group of individuals, although priority may be given to siblings of enrolled students and to children of charter school employees (S.C. Code of Laws, tit. 59, ch. 40, § 59-40-50(B)(7) (1998)).

VI. Policy Issues and Implications

A. Are requirements that charter schools mirror the racial or socio-economic composition of the host school district or the community constitutional?

B. What are the implications of failing to screen out certain students; e.g., violent students, in the wake of increased violence in schools across the nation? How does one balance the rights of all students to have access to education with rights of all students to be safe?

C. Can charter schools successfully meet their charge of increasing student achievement if all students are allowed access?

D. Can geographic boundaries be established without violating students' equal protection rights? Does the requirement to establish geographic boundaries constitute de jure segregation?

E. What other state and federal constitutional rights issues are present?

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ARE PRIVATE ENTITIES OPERATING CHARTER AND VOUCHER SCHOOLS STATE ACTORS FOR PURPOSES OF OBSERVING FEDERAL CONSTITUTIONAL RIGHTS?

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Are Private Entities Operating Charter and Voucher Schools State Actors for Purposes of Observing Federal Constitutional Rights?[1]

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Hypothetical #1: Suppose a state legislature permits private organizations to operate public charter schools but states that such schools are not subject to federal constitutional constraints. Later, a student is expelled without receiving notice and a hearing, and a teacher is terminated after the teacher criticizes the school's handling of children with disabilities. The student and the teacher sue in federal court, each claiming denial of constitutional rights. Is the school public or private for purposes of constitutional law?

Hypothetical #2: A private school opts to participate in a publicly funded voucher program. The program channels money through parents. The private school receives over 75 percent of its funding in this manner. The program requires participating private schools to adhere to all health and safety laws and to federal anti-discrimination laws applying to public schools, to undergo annual financial audits, to admit students randomly, to exempt students who are not of the school's faith from religious activities, to employ certified teachers, to agree not to teach hatred, to limit class size, to avoid misleading advertising, and to participate in the state's student assessment system. A student and teacher suffer the same fate as in the first hypothetical. Is the private school public or private for purposes of constitutional law?

A. Background

1. Educational privatization

There are three basic forms of educational privatization. The first type is traditional private schools operated independently of the state. About 10 percent of the American schooling population – or 5 million students – are educated in these schools, 78 percent of which are religiously affiliated.[2] The second type is private organizations operating public schools via contracting-out or charter school programs. About 12 percent of the nation's 2050 charter schools, which serve some 500,000 students, are operated by private organizations either directly as charter recipients or through contracting-out programs with charter recipients.[3] Arizona, Massachusetts, and Michigan have the most charter schools operated by private entities.[4] The third type is private schools participating in publicly funded voucher programs. For the 2000-2001 school year, these encompassed 103 private schools in Milwaukee, 52 private schools in Cleveland, and several private schools in Florida. Together, they enrolled about 14,000 students.[5]

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[1] For an in-depth discussion of, and citations related to, the points raised in this presentation, see Frank R. Kemerer and Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed.Law Rep. [589] (March 29, 2001) and Chapter 7 "School Choice Regulation: Accountability versus Autonomy" in R. Kenneth Godwin and Frank R. Kemerer, *School Choice Tradeoffs: Liberty, Equity, and Diversity* (Austin, TX: University of Texas Press, 2002 - forthcoming). See also Ralph Mawdsley, *State Action and Private Educational Institutions*, 117 Ed.Law Rep. [411] (June 12, 1997) and Andrew Broy, Comment, *Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation*, 79 N.C.L. Rev. 493 (2001).

[2] National Center for Education Statistics, *Private School Universe Survey*, 1995-96 (U.S. Dept. of Education, 1998).

2. The state action principle

The Fourteenth Amendment to the U.S. Constitution and its enabling statute, 42 U.S.C. § 1983, require states and their political subdivisions to recognize the constitutional rights of their constituents: freedoms of speech, religion, assembly, and association; the right to be free from unreasonable searches and seizures; the right to due process of law; the right to equal protection of the laws; and other rights that the U.S. Supreme Court considers fundamental, e.g., marriage. However, as nongovernmental entities, private organizations, including private schools, normally are not required to comply with constitutional law.

3. Application of the state action principle to private entities: The U.S. Supreme Court's 1982 *Blum* Trilogy

Blum v. Yaretsky, 457 U.S. 991 (1982). The Court ruled 7-2 that a private nursing home's transfer of Medicaid patients to a lower level of care based on medical judgment was not state action because the decision was not prompted by the "coercive power" of the state or its officials but rather reflected the judgment of medical professionals. To establish state action in the context of private entities, a close nexus between the state and the challenged action must be established so that the actions taken by the private entity may fairly be treated as those of the state.

Lugar v. Edmondson Oil Company, 457 U.S. 922 (1982). The Court ruled 5-4 that a corporate creditor and its president acted under color of law when they used a state statute to secure a prejudgment attachment of a debtor's property in state court without affording the debtor due process of law.[6] In the process the Court articulated a two-part approach to state action: (1) the action "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and (2) the party charged with the action must be a person who fairly may be said to be a state actor because he is a state official, because he acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

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[3] Center for the Study of Education Reform, University of North Texas, Denton. June 2000. In September 2001, there were approximately 2050 charter schools serving 500,000 students in 34 states. Center for Education Reform (Washington, D.C.). http://www.edreform.com

[4] For example, in Michigan about 70 percent of Michigan's charter schools (called academies) – some 120 – are operated by educational management organizations (EMOs).

[5] Web sites of the respective departments of education.

[6] In a footnote, the majority observed that it was not holding that a private party's mere invocation of state legal procedures constitutes joint participation with the state so as to satisfy § 1983 requirements of acting under color of state law. The ruling was limited to the factual context of the case. 457 U.S. at 939, n. 21.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) – to be discussed in the context of private schools and vouchers below.

4. Recent developments

West v. Atkins, 487 U.S. 42 (1988). Court relied on the *Blum* Trilogy to rule unanimously that a private physician under contract to provide orthopedic services on a part-time basis at a state prison hospital was a state actor. The critical factor was not whether the physician was on the public payroll or paid by contract but rather that he was exercising power possessed by virtue of state law and made possible because he had been clothed with state authority to render medical services to prison inmates.

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988). Court ruled 5-4 that the actions of the University of Nevada at Las Vegas (UNLV) in levying sanctions against its basketball coach pursuant to NCAA recommendations did not convert NCAA into a state actor. In ruling that NCAA was not a state actor, the Court drew on its earlier precedents to note that the question of whether the state is sufficiently involved to treat conduct as state action requires (1) the state to create the legal framework governing the conduct, (2) the state to delegate its authority to a private actor (as in *West*), or (3) the state knowingly to accept the benefits derived from unconstitutional behavior (referring to an old civil rights case[7] involving a private restaurant that engaged in segregation on the premises of a public parking garage). Here the Court observed that the NCAA is composed of many public and private institutions from across the country and that UNLV played a minor role in the development of NCAA rules and in fact opposed their application to Tarkanian. Thus, the suspension of Tarkanian was not the result of state action but of the action of a private entity under whose rules the UNLV conducted its athletic program.

Lebron v. National Railway Passenger Corporation (Amtrac), 513 U.S. 374 (1995). Court ruled 8-1 that Amtrac is part of the government for purposes of the 14th Amendment despite language in the enabling statute to the contrary. A key factor in the ruling was the authority given the President to appoint (but not remove) most of the board of directors. But the Court also noted that Amtrac was established for the purpose of "pursuing federal objectives under the direction and control of federal governmental appointees." In a key sentence, the Court stated, "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed by the Constitution by simply resorting to the corporate form." This case has relevance to state statutes that classify charter schools as nonprofit corporations, e.g., Colorado, Michigan.

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[7] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)

Brentwood Academy v. Tennessee Secondary School Athletic Association, 121 S.Ct. 924. (2001) Court ruled 5-4 that Tennessee Secondary School Athletic Association (TSSAA), unlike the NCAA in the *Tarkanian*, is composed of mostly public schools in Tennessee and its activities are determined mostly by public school officials. TSSAA is sufficiently "entwined with governmental policies" to be considered a state actor.[8] Thus, Brentwood Academy could pursue its claim that TSSAA violated the First Amendment in levying sanctions against it over representations made by its coaches to prospective athletes.

B. Charter Schools Operated by Private Entities

1. All state constitutions vest their legislature with responsibility for education.[9] Thus, education is a core governmental activity.
2. State constitutions also routinely have terms like "public," "general," "common," "uniform," and "thorough" that characterize the nature of the schooling system that the legislature and its subordinate agencies are responsible for establishing and operating. Many state constitutions also restrict funding to public schools only.[10]
3. State legislation generally declares that charter schools are public schools[11] and/or that charter recipients are public agents.
4. Unconstitutional delegation law is a judicially created doctrine that limits the extent to which states can delegate core governmental activity to private educational organizations.

Two illustrations in the context of charter schools:

In re Charter School Application, 727 A.2d 15 (N.J. Super.A.D.1999), *aff'd*, 753 A.2d 687 (N.J. 2000). Lower court first cites N.J. Supreme Court proposition that "To be constitutionally sustainable, a delegation [of legislative authority to private groups] must be narrowly limited, reasonable, and surrounded by stringent safeguards to protect against the possibility of arbitrary or self-serving action detrimental to third parties or the public good generally." Court notes that because under the terms of the statute, charter schools remain public schools even if operated by private entities and because they are subject to the control of the Commissioner of Education, the legislature did not unconstitutionally delegate authority to private actors. The N.J. Supreme Court affirmed, adding that, to satisfy constitutional requirements, (1) the Commissioner must assess the impact of charter schools on racial balance generally and take whatever steps are necessary to prevent segregation and (2) the Commissioner must consider economic impact of charter schools on traditional public schools and either disapprove a charter school or adjust the funding formula set forth in the charter school legislation to assure constitutional compliance.

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[8] Citing *Evans v. Newton*, 382 U.S. 296 (1966) (private trustees to whom city had transferred a park were ruled to be state actors and barred from enforcing racial segregation policies because the park served a public purpose and the municipality remained entwined in the park's management and control).

[9] Allen W. Hubsch, *Education and Self-Government: The Right to Education under State Education Law*, 18 J.Law & Educ. 93 (1989). In an appendix, Hubsch lists the primary constitutional provision of each state that pertains to the establishment of an educational system.

[10] See Preston Green, *Are Charter Schools Constitutional?: Council of Organizations and Others About Parochiaid v. Governor*, 125 Ed.Law Rep. [1] (June 11, 1998), at 1 and Table 1 at 7.

[11] Example: "Charter schools shall be part of the state's program of public education. All charter schools in Florida are fully recognized as public schools." Fla. Stat. Ann. § 228.056 (1) (West 2001).

Council of Organizations and Others For Education About Parochiaid v.Governor of Michigan, 548 N.W.2d 909 (Mich. App. 1996), *aff'd*, 566 N.W.2d 208 (Mich.1997): Michigan charter school law permits private entities to operate charter schools as nonprofit corporations. Lower courts declared the first version of the law unconstitutional because it circumvented the state constitutional requirement that all education be under the general control and supervision of the state board of education. As the appellate court noted, "The people have a right to have the limitations in a state constitution respected and given the fair and legitimate force which its terms require." Before the case reached the state supreme court, the legislature added several accountability measures, including the requirement that all charter school teachers be state certified, that charter schools are subject to the authority of the State Board of Education, that charters cannot levy taxes, and that charters must comply with the school code. Citing these changes, the Michigan Supreme Court upheld the charter law. [Query: Did the legislature go too far? Might other, less intrusive accountability measures satisfy constitutional requirements? How much accountability is enough?]

2. Lessons from the privatization of correctional facilities[12]
    (a) Like schooling the operation of prisons is a core governmental activity.
    (b) Half the states and the federal government have enacted legislation providing for prison privatization, and more than 100 private prison facilities are operating in the country with an annual growth rate of 30 percent.[13]

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[12] For a detailed discussion and citations to legal commentary, see Frank R. Kemerer "Legal Issues Involving Educational Privatization and Accountability." Occasional Paper #6, National Center for the Study of Privatization in Education, Teachers College, Columbia University (2000). http://www.tc.columbia.edu/ncspe

[13] Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N. C. L. Rev. 2209, 2218 & 2265, n. 361 (1998).

(c) The regulations that govern prisons operated by private entities are comprehensive, and the contracts are detailed regarding the conditions contractors are to meet and provide incentives and sanctions for failing to achieve desired goals.

(d) The consensus in the legal community is that private prisons act under color of state law and are subject to constitutional law regarding inmate rights. Available case law supports this point. Example: *Blumel v. Mylander*, 919 F. Supp. 423 (M.D. Fla 1997) (Private operator of a county jail could be held liable for unconstitutionally detaining an arrestee since Florida statute permitting counties to contract with private entities to run jails and prisons makes private operator the equivalent of a public entity). At present, a case is pending before the U.S. Supreme Court on whether companies that operate prisons under contract with the federal government may be held liable for constitutional violations committed by their employees. The Second Circuit has ruled in the affirmative. *Malesko v. Correctional Services Corporation*, 299 F.3d 374 (2nd Cir. 2000), *appeal granted*, 121 S.Ct. 1224 (2001). In 1997 the Supreme Court ruled that employees of private prisons are not entitled to qualified immunity under § 1983 when sued in their individual capacity, noting no firmly rooted tradition of immunity for such employees and no public policy reason to extend it. *Richardson v. McKnight*, 521 U.S. 399 (1997). In short, the operators of private prisons are sufficiently in the public domain that both they and their employees may be held liable for constitutional violations.

3. Conclusions about the status of charter schools operated by private entities:

- Since education is a core governmental activity placed on state legislatures by the state constitution,
- Since charter schools generally are labeled public schools in enabling legislation,
- Since unconstitutional delegation law pressures legislatures to add accountability measures for charter schools operated by private entities either directly or through their chartering agencies,
- Private entities operating such a school are sufficiently clothed with the public interest to be constrained by the federal constitution.

4. Do the student and the teacher have strong claims in Hypothetical #1?

(a) Student is entitled to due process, since the charter school is a public school. If it were otherwise, then the state could convert all of its public schools to charter schools as a way of avoiding compliance with constitutional strictures.

(b) Likewise, the teacher is entitled to constitutional protection for the exercise of free speech. Consider the recent ruling in *Jones v. SABIS Educational Systems, Inc.*, 52 F. Supp.2d 868 (N.D. Ill. 1999). Federal district court assumed without discussion that the foundation receiving a charter to operate two charter schools and the private company hired by the foundation to run the school were both sufficiently public for purposes of 42 U.S.C. § 1983 to be required to recognize the constitutional rights of employees. This was true even though the charter and the foundation's agreement with SABIS specified that all instructional providers and other employees of the school were employees of SABIS and not the foundation. The case arose when the African American principal, an at-will employee at one of the schools, was terminated after he allegedly protested the adoption of a discipline code that he believed violated the Individuals with Disabilities Education Act and protested SABIS's refusal to hire two African American teachers.[14]

C. Private Schools Participating in Publicly Funded Voucher Programs

1. Private schools operated independently of the state

(a) By virtue of the U.S. Supreme Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), private schools have a right to exist. At the same time, the state has the right to reasonably regulate them, providing that regulation is not so extensive as to undermine their mission and interfere with the right of parents to control their children's upbringing. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

(b) Most of the regulations imposed by states on private schools since 1925 has been limited , e.g., compliance with health and safety codes, length of the school year, enrollment reporting. Legal challenges are generally decided in favor of the state. A significant recent illustration is the Sixth Circuit's decision upholding the right of Ohio to require private schools operated independently of the state to participate in the state's student assessment system. *Ohio Ass'n of Independent Schs. v. Goff*, 92 F.3d 419 (6th Cir. 1996).

(c) Seventy-eight percent of America's private schools are religiously affiliated. The U.S. Supreme Court ruled in 1990 that religion cannot provide a special exemption from neutral laws of general applicability. *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The consensus to date is that, except in the case of the Old Order Amish, religion does not provide a special exemption from generally applied private school regulation.

(d) Private schools operated independently of the state remain private, even when they receive substantial state funding. This is the teaching of the third case in the 1982 *Blum* Trilogy. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Two teachers claimed their civil rights were violated when their contracts were terminated by a private school for maladjusted high school students that received nearly all its funding for the state. While the school did have to comply with various state regulations as a result of the funding, personnel matters were left to the discretion of the school. The Court concluded that the school had not sacrificed its private status by becoming substantially publicly funded. What was missing was an entwining relationship between the state and the school with regard to personnel matters.

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[14] For a discussion of the legal aspects of employment in the context of educational privatization, including the role of unions and collective bargaining, see Frank R. Kemerer "The Legal Status of Privatization and Vouchers in Education," in Henry M. Levin (ed) *Privatizing Education* (Boulder, CO: Westview Press 2001).

2. Lessons from the Section 8 public housing voucher program[15]
    (a) Congress established the Section 8 housing voucher program in 1983.[16] Eligible low-income families obtain a voucher from the public housing authority and then seek out an apartment and an owner willing to execute a lease. The tenant pays no more than 30 percent of household income toward the monthly rent, the housing authority picks up the rest. While the statute leaves considerable discretion to private housing providers in picking tenants, it spells out in great detail the amount of assistance, housing quality standards, types of housing, and conditions for lease terminations. The implementing federal regulations are very detailed.[17] Conditions for terminating leases are specified.

    (b) The regulations in combination with the public voucher have resulted in federal courts finding sufficient government involvement to give tenants a constitutionally protected property right in the lease. In one early decision, the federal court noted, "When . . . the relevant statutes and regulations are viewed in their entirety, this court concludes that 'state action' exists."[18] Other federal courts have held that tenants faced with eviction are entitled to a due process hearing for the same reason.[19] In 1992 an Ohio appellate court cited a number of cases for the proposition that unless good cause for eviction is demonstrated, a Section 8 tenant "may remain in the housing for life, and his right to do so is a constitutionally protected property right."[20]

    (c) The extensive regulation of the landlord-tenant relationship and the housing quality standards deter many private housing vendors from participating in the program.

3. Private schools participating in publicly funded voucher programs
    (a) Schools participating in a publicly funded voucher program may receive much, if not most, of their funding from the state, albeit indirectly through parents.

    (b) There is nothing that precludes a state from requiring private schools that participate in such programs to observe the constitutional rights of their constituents just as public schools must do.

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[15] For a detailed discussion, see Frank R. Kemerer, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed.Law Rep. [589] (March 29, 2001).

[16] 42 U.S.C. § 1437f(o) (2000).

[17] 24 C.F.R. § 982.401 (2000).

[18] *Gallman v. Pierce*, 639 F. Supp. 472 (N.D. Cal. 1986) (plaintiffs entitled to 30-day notice of termination of their month-to-month lease to include a statement of reasons constituting good cause for termination).

[19] See, for example, *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982).

[20] *Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554, 558 (Ohio App. 1992).

Indeed, for many years, regulations issued by the Wisconsin State Superintendent of Public Instruction required participating schools in the Milwaukee Parental Choice Program to do so.[21] And private schools that provide special education services under contract with public school districts are required to provide the same rights to their students as public schools under IDEA.[22]

4. Extensive regulations are not likely to be imposed on publicly funded voucher programs, in part because private schools start out as relatively autonomous entities and in part because the state opts for an alternative to the public schooling system. The Cleveland scholarship program and the Milwaukee Parental Choice Program are both subject to few restrictions.[23] There are no requirements for:

- Teacher certification
- Teacher terms of employment
- Curriculum content
- Enrollment diversity
- Student discipline
- Compliance with open meetings and records acts
- Student assessment (except for state-accredited private schools in Ohio)

5. If vouchers become more prevalent, the state faces the "Goldilocks Test: Too little regulation will trigger unconstitutional delegation charges. Too much will trigger claims of unreasonably interfering with private school autonomy and curtailing parent rights to control their children's upbringing. The question becomes: what type and amount of regulation is "just right"?

6. Do the student and the teacher have strong claims in Hypothetical #2?

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[21] The regulations were imposed when the program began in 1991 and were not rescinded until 1998.

[22] 20 U.S.C. § 1412 (a)(10)(B)(ii) (2000). Federal regulations require state education agencies to ensure that these requirements are met. 34 C.F.R. § 300.401(b) and (c) (2000).

[23] Private schools are minimally regulated in Wisconsin. Wis. Stat. Ann. § 118.165 (West 2000) The voucher law requires each choice school to meet only one of the following: at least 70 percent of the students in the program are to advance one grade level each year, the private school's average attendance rate for students in the program is to be at least 90 percent, at least 80 percent of the students in the program are to demonstrate significant academic progress, or at least 70 percent of the families of the pupils in the program are to meet parental involvement criteria established by the private school. The schools are to adhere to federal anti-discrimination law though they are not required to serve children with disabilities following the trial court ruling in 1991, are to adhere to all health and safety laws applying to public schools, to admit applicants randomly, to exempt students not of the school's faith from religious activities, and to submit an annual financial audit. Wis. Stat. Ann. §§ 119.23(3)(a), (7)(a), 7(c) (West 2000). Private schools in Ohio are more closely regulated to be state-accredited and must participate in the state student assessment system. Ohio Admin. Code § 3301-35-04. But an exemption from most of these regulations is available for religious private schools. *Id.* 3301-35-08 (2000). The regulations accompanying the Cleveland voucher program are minimal: no discrimination on the basis of race, religion, or ethnicity; no teaching of hatred; maintain a minimum enrollment per class and for the school as a whole; and avoid false or misleading advertising. Ohio Rev. Code Ann. § 3313.976(A) (West 2000). Schools may not charge more than 10 percent of the voucher in additional tuition and fees. Except for enrolled students and siblings, admission is by lot in kindergarten through third grade.

The regulations imposed on the schools in the hypothetical represent an amalgamation of the regulations currently in effect for the Milwaukee and Cleveland publicly funded voucher programs. Since neither student discipline nor teacher terms and conditions of employment are affected by them, it is likely that the school remains private and that neither student nor teacher will be entitled to constitutional protection.

E. Summary

1. Constitutional and statutory requirements combine to assure that in most instances charter schools operated by private entities remain public schools subject to constitutional constraints. The one uncertainty is the due process rights of teachers, since the terms and conditions of employment often are left to the discretion of the private operator.

2. The traditional status of private schools as relatively autonomous organizations, the high threshold established by the U.S. Supreme Court for converting private action into public action, and the reluctance of legislatures to impose comprehensive regulations – at least so far – on private schools participating in publicly funded voucher programs suggest that these institutions are not subject to constitutional constraints. However, it is possible that unconstitutional delegation law in combination with creeping regulation may result in sufficient entwinement with the state that private voucher schools will be required to observe the constitutional rights of their constituents. Whether it should be so is another question.

EDUCATION LAW PREPARATION OF SCHOOL ADMINISTRATORS: LEGAL KNOWLEDGE OF SCHOOL OFFICIALS

Analysis of Legal Knowledge of School Officials in Texas

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Analysis of Legal Knowledge of School Officials in Texas[1]

Problem

Our society is becoming more litigious and public schools are not immune from litigation. In fact, public school litigation is on the increase (Kemerer & Walsh, 2000; Hartmeister & Hundere, 2000; Redfield, 2000; Gordon, 1997). Prior to understanding how their actions may result in legal action, school officials must first know what actions typically lead to litigation and know how their knowledge of the legal issues relate to those actions.

Research related to school officials' knowledge of school law is dated, and in Texas, the research is virtually non-existent. School officials approach the law "with anxiety and fear, as a trap to ensnare any educator who makes an innocent mistake" (Fischer, Schimmel, & Kelly, 1999, p. vii). LaMorte (2002) succinctly noted

> Judicial activity has produced a sizable body of school law with which educators should be familiar if they wish to conduct themselves in a legally defensible manner. Those educators who "fly by the seat of their pants" or who act on the basis of what they think the law "should be" may be in difficulty if sufficient thought is not given to the legal implications and ramifications of their policies or conduct. (p. xxiii)

Hillman (1988) concluded that school officials' lack of knowledge of legal issues might be attributed to several factors. First, school officials have a limited amount of time to spend on locating and understanding information regarding legal issues. Second, many of the legal resources that can be used by school officials are not readily available. Third, school officials are unaware of how to access the relevant legal information.

Relevant Research

There is a paucity of recent research since 1990 describing the levels of knowledge that school officials have of legal issues affecting public schools. A thorough review of the literature revealed that studies relating to school officials' knowledge of school law has come primarily from doctoral dissertations. These studies identified that school officials displayed an alarming lack of knowledge about legal issues that affect them on a daily basis.

Terrell (2001) conducted a study of elementary school principals in north central Texas. She found that elementary school principals do not command a fundamental knowledge of legal issues. Furthermore, she found that as principals aged, their knowledge of legal issues waned.

Moore (1997) discovered that there was no significant difference between undergraduate's (prospective teachers) and post-graduate's (classroom teachers) knowledge of school law. He further discovered that years of teaching experience did not significantly impact the teachers' knowledge of school law.

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Gullatt and Tollett (1997) note that teacher preparation in areas of education law are quite limited. Few states offer undergraduate or graduate courses offer specific courses in education law for teachers.

Singletary (1996) attempted to determine superintendents', principals', and classroom teachers' knowledge of student legal rights. Although no conclusions regarding the level of knowledge of superintendents, principals, and teachers were formed, Singletary (1996) concluded that principals generally possessed a superior knowledge of students' rights issues than did superintendents and teachers. Contrary to Moore's findings, Singletary discovered that experienced teachers and administrators commanded a better understanding of students' rights issues than did less experienced teachers.

Gordon (1996) found that secondary school principals in West Virginia possessed an "average preparation" in school law. The Gordon study did not, however, determine whether the amount of preparation was adequate for them to perform their job effectively.

Daley (1994) examined the knowledge of tort law of elementary and secondary principals and teachers in Virginia and indicated that teachers in Virginia do not have a working knowledge of tort law. Furthermore, Daley (1994) noted that teachers who were older and more experienced possessed a better understanding of tort law issues than their younger, less experienced counterparts.

Kuck (1992) found that Illinois teachers possess an inadequate knowledge of their legal responsibilities. The study of private and parochial teachers also revealed that teacher inservice programs and professional readings were not sufficient in raising the teachers' level of knowledge of legal issues.

Clark conducted a survey of superintendents, principals, and teachers in Mississippi in 1990. Clark (1990) revealed that although there was a significant difference in the knowledge of the components of school law among superintendents, principals, and teachers, the knowledge possessed by all these groups was marginal. Clark (1990) concluded that "this study illustrates the need to develop a curriculum for staff development in the area of students' rights and the law … and demonstrates the need for teacher education programs to develop courses that will help prepare teachers and administrators to cope with situations involving students' rights" (p. 2315).

Steele (1990) found that Florida school administrators do possess only a minimal amount of objective knowledge about school law issues. Furthermore, Steele noted that there is no correlation between the administrators' objective knowledge of law and ability to solve real legal problem.

McLoughlin, Sametz, and Strieb (1983) found that prospective teachers at a mid-western state university "are not simply uncertain about the law, but have clear misconceptions" about the law (p. 598). After studying 11 legal themes prevalent in public schools, McLoughlin, et al. (1983) noted that "colleges of education have a clear responsibility to prepare future educators for a career within a litigious society" (p. 599).

A search of the dissertation abstracts revealed seven dissertations that studied various aspects of educators' knowledge of school law (Souve, B.A., 1986; Johnson, J.M., 1985; August, B.P., 1984; Boyle, J.F., 1982; Carmon, L., 1982; Gascue, J.D. , 1982; Potter, C.A., 1980). All seven of these studies were conducted prior to 1990, and only one studied educators in Texas. In 1983, Porter undertook a study to determine Texas student teachers' knowledge of student liability issues. Not surprisingly, Porter (1983) found that student teachers did not possess a general knowledge of tort liability for student injury.

The review of the literature revealed that very little research has been conducted about the extent of legal knowledge of school officials. However, the research that has been conducted indicates that school officials know very little about school law issues. Furthermore, those school officials who display knowledge of school law issues have difficulty applying that knowledge to situations that occur on a daily basis.

The Study

The research was conducted to ascertain the level of knowledge of school officials in Texas. Cases in the civil, criminal, and administrative courts in Texas were reviewed to determine the issues proposed for litigation or actually litigated. Additionally, scenarios with forced-choice responses were created to determine how well school officials were able to apply legal principles in an educational setting. In conjunction with the scenarios, open-ended questions were asked to obtain school officials' opinions of pressing legal issues as they pertain to public school education.

For the purposes of this study, school officials were defined as school board presidents, superintendents, secondary principals, and classroom teachers. Elementary principals were not included because another researcher conducted a related study. School board presidents and superintendents represented the state of Texas. Secondary principals represented the geographic area known as the Tarleton State University service area. Classroom teachers represented campuses enrolled in Tarleton's Effective School Project, a regional school improvement project consisting of 67 campuses in north central Texas.

Data Collection

Three types of data were collected. First, regulations and standards from each of the 50 states were reviewed to ascertain the requirements for training. The researchers attempted to determine if state requirements mandated training of legal issues. Gullatt and Tollett (1997) noted that very few states had specific courses for teachers, but data indicating legal education requirements for administrators and school board members are limited.

Second, a thorough review of court cases was conducted to determine the areas of legal that have shown to be most troublesome to school officials. Lexis-Nexis© and Westlaw© databases were used to locate appealed court cases affecting teachers, administrators, and school districts. Civil, criminal, and administrative courts were reviewed. In the civil and criminal courts, a review was conducted in the Texas courts. State level courts in the other 49 states were not reviewed. In the administrative courts, the dockets of the Texas Education Agency (previous 10 years) and the Texas State Board for Educator Certification (previous 6 years) were reviewed.

Third, questionnaires were distributed to teachers, campus principals, superintendents, and school board presidents. Each questionnaire was constructed by a graduate class at Tarleton State University, and modified after analyzing the review of court cases. The questionnaires were tailored to address issues relevant to the school officials' position. University professors, school attorneys and school superintendents validated the questionnaires. The questionnaires were constructed as scenarios with a forced-choice response to each scenario. Each question was constructed to have a right and wrong answer. Failure to select a response was recorded as an incorrect response. Additionally, each questionnaire provided the respondent with the opportunity to list issues related to school law in which the respondent was least knowledgeable.

Selection of School Officials

Classroom teachers were selected from campuses participating in Tarleton State University's Effective Schools Project. The questionnaires were packaged and sent to the campus principal in March 2001 with directions to distribute the questionnaires to the teachers on the campus. Directions on how to respond to the questionnaire and a stamped, self-addressed return envelope accompanied each questionnaire. Questionnaires were returned directly to the researcher via the postal system. 2,331 questionnaires were distributed and 837 were returned leading to a response rate of 35.9%.

Secondary principals were chosen as the campus administrators for this study. (A similar study was conducted on elementary principals as a subset of this study and the results are reported in Terrell's master's thesis.) Secondary campuses in the Tarleton State University service area were selected. A secondary campus was defined as high school campuses, or any campus that served grades six or greater. (A campus that housed grades five and six was considered an elementary campus and was not included in the study.) Questionnaires were mailed directly to the campus principal in April, 2001 via the postal system. Directions for completing the questionnaire and a stamped, self-addressed return envelope accompanied each questionnaire. Three hundred forty-five (345) questionnaires were mailed and 139 were returned for return rate of 40.3%.

All superintendents in Texas were selected for the study. One thousand nineteen (1,019) questionnaires were mailed April, 2001 with a cover letter providing direction to complete the questionnaire. Each superintendent also received a stamped, self-addressed return envelope. Four hundred forty-six (446) questionnaires were returned for a return rate of 43.8%.

In May, 2001 questionnaires were mailed to all school board presidents in Texas. Directions for completing the questionnaire and a stamped, self-addressed return envelope accompanied each questionnaire. One thousand forty-nine (1,049) questionnaires were mailed and 129 were returned for a return rate of 12.3%.

Results

Three types of data were collected. The results will be reported according to each type--training requirements, review of court cases, and survey results.

Training Requirements

The training requirements for each state were reviewed. The purpose of the review was to ascertain the training requirements for classroom teachers, principals, superintendents, and school board members in school law issues. In some instances, the data were ascertained from professional agencies (e.g., National School Boards Association), but in many instances state representatives were contacted by email, or state requirements (listed on the Internet) were reviewed.

When the researchers were unable to obtain information concerning the training requirements of school officials in legal issues, the training requirement was categorized as "uncertain." Table 1 depicts the results. Particularly with classroom teachers, specific requirements for training in school law are briefly mentioned in established state standards.[2]

Table 1

	Training Requirements?		
School Official	Yes	No	Uncertain
Classroom Teachers	9	28	13
Principals	23	17	10
Superintendents	20	19	11
School Board Members	20	30	0

Review of Training Requirements

Review of Cases

In an attempt to ascertain actual causes of litigation, the study reviewed the Texas criminal and civil courts and the administrative court dockets of the Texas Education (TEA) and the Texas State Board for Educator Certification (SBEC). A cursory review was conducted of each case filed. In the court systems, 200 cases were located in the Texas appeals courts, 1,127 cases were docketed with the TEA, and 8,892 cases were docketed with SBEC.

Texas Courts. The review of the Texas courts covered cases from 1990 to the date of review in January, 2001. Utilizing key words to search for education-related court cases revealed 200 court cases. The results of the cases were categorized as contract issues (breach of contract, non-renewal, termination, etc.), violations of the Texas Open Meetings Act, personal injury, sexual harassment and related issues, tax and property, corporal punishment, wrongful death, workman's compensation, and defamation. Results of the review of court cases are displayed in Table 2.

Table 2

Category	Number of Cases	Percentage of Total
Contract Issues	58	29
Violations of TOMA	12	6
Personal Injury	11	5.5
Tax	9	4
Sexual Harassment	8	4

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[2] It is the observation of the researchers that the mention of legal training in state standards for classroom teachers seldom translates into courses in school law (see Gullat and Tollet, 1997). However, the mention of legal training in state standards for school administrators often translates into specific graduate-level courses.

Property Issues	8	4
Corporal Punishment	6	3
Wrongful Death	6	3
Workman's Compensation	5	2.5
Defamation	5	2.5

Results of Court Cases Reviewed

Using key terms and two databases (Lexis-Nexis© and Westlaw©) resulted in a duplication of the court cases returned. The researchers controlled for the duplication. In instances where court cases could be placed in multiple categories, the dominating issue categorized the case. The dispensation of the cases was not considered for the purposes of this study.

Texas Education Agency Docket. The Texas Education Agency (TEA) administrative court docket was accessed through the TEA website. Cases reviewed were those placed on the docket since 1990, and special education hearings were not considered for this study. Some of the cases in the docket could be placed in multiple categories, therefore 79 categories were established. The TEA docket consisted of 1, 127 cases. The most commonly docketed cases were actions against certification[3] (code of ethics violations), contractual issues, career ladder issues (no longer a claim in Texas), grievance issues, unworthiness to instruct, sexual misconduct, evaluation and appraisal issues, and assignment of personnel. Table 3 lists the most commonly cited causes for administrative court hearings at TEA.

Table 3

Category	Number of Cases
Actions against certification	224
Contract non-renewal, termination, dismissal	191
Career ladder	153
Grievance	153
Breach of contract, contract dispute	48
Unworthiness to instruct	45
Sexual misconduct	43
Evaluation and appraisal	42
Assignment/reassignment	42

Texas Education Agency Docket

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[3] The State Board for Educator Certification (SBEC) was created by the state legislature in 1995. Prior to SBEC, code of ethics cases were heard in the Texas Education Agency administrative court system.

State Board for Educator Certification Docket. Since its creation in 1995, SBEC has dealt with certification-related issues[4]. Unlike the TEA, who utilizes an internal administrative court system, SBEC initially utilized the TEA administrative courts. In 1997, SBEC began utilizing the administrative court system provided by the state--the State Office of Administrative Hearings (SOAH). Like the TEA docket, the SBEC docket identified the cases in multiple categories. The 8,892 cases were not reviewed, but numbered by the category on the SBEC docket. The most common cases are displayed in Table 4.

Table 4

Category	Number of Cases
Theft/robbery/burglary	1,559
Abuse & neglect	888
Assault	861
Drugs	771
Fraud/bribery/forgery	485
Sexual misconduct	455
Improper or inappropriate conduct	318
Larceny	202
Molestation/fondling/indecency	139
Negligence	111
Sexual assault/rape	110

State Board for Educator Certification Docket

Survey Results

In addition to surveying school officials for perceived areas of weakness in school law, the study attempted to identify actual areas of weakness in school law. To do this, the questionnaire was constructed in two parts.

The first part of the questionnaire was comprised of scenarios with forced choice responses. Each scenario was constructed to create a legal dilemma common to the school officials' position. The respondent was directed to choose the legally correct response of the two available responses.

The second part of the questionnaire solicited responses from school officials to the following two questions.

Question 1--What aspects of your current responsibilities can more readily result in legal action against a [school official] in your district?

Question 2--What areas of school law would [school officials] appreciate having a better background or better understanding?

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[4] It must be noted that the actual cause of action against the certification may be a criminal act, and probably litigated in the criminal courts. However, because the person named in the case was issued a certificate by the State of Texas, the case was considered by SBEC in the administrative courts.

The questionnaires were developed by a graduate school law class at Tarleton State University in the fall of 1999. The class validated the surveys with attorneys active in Texas school law, and superintendents in Texas. A panel of university professors modified the questionnaires for clarity.

Data resulting from this study are still being analyzed. For the purposes of this paper, a brief presentation of the results for classroom teachers, secondary principals, and superintendents will be presented.

Classroom Teachers

Classroom teachers on campuses participating in Tarleton State University's Effective Schools Project were selected for this study. Two thousand three-hundred thirty-one (2,331) questionnaires were distributed and 837 were returned for a response rate of 35.9%. The majority of teachers responding (64%) were from districts with fewer than 10,000 students. Most of the teachers (33%) possessed 10-20 years of teaching experience with 28.5% possessing more than 20 years of teaching experience.

Part I-Scenarios. Results from the forced-choice scenarios indicate that classroom teachers have very little knowledge of legal issues relating to teacher contracts and non-renewal provisions. Other areas where classroom teacher failed to demonstrate mastery were special services curriculum, compulsory attendance, religion and prayer in the classroom, liability related to student transportation, and teacher freedom of speech. Classroom teachers demonstrated mastery on questions related to special education and liability.

Part II-Open-ended Questions. When asked the question " What aspects of your current responsibilities can more readily result in legal action against a [school official] in your district?" the most frequent responses related to special education. Discipline issues were second, with student health and safety liability issues a distant third.

Also posed was the question " What areas of school law would [school officials] appreciate having a better background or better understanding?" Classroom teachers cited a general knowledge of school law issues as their greatest need. Not surprisingly, special education and Section 504 topics were second. Table 5 lists the top five areas that classroom teachers cited as needing a greater understanding or better background.

Table 5

Subject	Percentage of Comments
School law (in general)	19.81%
Special education/Section 504	13.96%
Employee rights	13.58%
Student discipline	9.06%
Religion	6.60%

Principals

Secondary principals in the Tarleton State University service area were selected for this study. Three hundred forty-five (345) questionnaires were distributed and 139 returned for a response rate of 40.3%. The vast majority of those responding represented school districts with fewer than 10,000 students. Approximately 70% of the respondents had more than 20 years of experience in education, and most (94%) possessed a master's degree.

Part I-Scenarios. Results from the forced-choice scenarios indicate that secondary principals demonstrate a lack of knowledge of school law on issues relative to their position. A minimum of 70% correct (11 of 15 choices) on the scenarios was identified as commanding a knowledge of school law issues. The survey revealed that 66.2% (92 of 139) of the principals queried identified a minimum of 70% (11) of the legally correct responses to the scenarios.

A slightly different picture was presented when each question was analyzed. Seventy percent (70%) of the respondents correctly identifying the legally acceptable answer to the scenario was identified as demonstrating adequate knowledge of school law on the scenario. In 11 of the 15 scenarios presented, the principals correctly identified the legally acceptable answer. Those scenarios can best be described as representing the following areas of school law:

- Student search and seizure (96.4% mastered)
- Civil immunity from liability (96.4% mastered)
- Just cause for a search (95% mastered)
- Teacher freedom of speech-religion (91.4% mastered)
- Special education (88.5% mastered)
- Student information-FERPA (81.3% mastered)
- Student freedom of speech (81.3% mastered)
- Student discipline-special education (79.8% mastered)
- Curriculum-sex education content (76.9% mastered)
- Reporting abuse/neglect (76.3% mastered)
- Religion in the school (75.5% mastered)

Four scenarios proved troublesome to the principals. The scenarios in which principals failed to correctly identify the legally correct answer at a rate of 70% were:

- Teacher freedom of speech (69.1% mastered)
- Curriculum development-sex education (55.4% mastered)
- Compulsory attendance (28.8% mastered)
- Curriculum-religion (18.7% mastered)

Part II-Open-ended Questions. As previously stated, two open-ended questions were posed the principals. When asked the question " What aspects of your current responsibilities can more readily result in legal action against a [school official] in your district?" the most frequent responses related to special education. Discipline issues were a distant second. Table 6 displays the top six most frequent responses from principals.

Table 6

Act/Subject	Percentage of Comments
Special education issues (including discipline)	35.9%
Discipline	14.5%
Harassment	7.6%
Failure to act/Negligence	6.9%
Personnel issues	6.2%
Transportation	5.5%

Secondary Principals-Acts Resulting in Legal Action

Also posed was the question " What areas of school law would [school officials] appreciate having a better background or better understanding?" Once again, special education was mentioned most frequently. Table 7 displays the six most frequent responses from principals.

Table 7

Subject	Percentage of Comments
Special education issues/Section 504	35.2%
Personnel issues	10.2%
Student, parent, and employee rights	8.0%
Attendance issues	8.0%
Changes in state and federal laws	5.7%
Discipline	4.5%

Secondary Principals-Better Understanding Needed

The data indicated that secondary principals in the small districts are approximately 25% more likely to recognize a teacher's right to speak on matters of public concern than are principals in large districts. However, secondary principals in larger districts are approximately 39% more likely to identify the legally appropriate manner of supervising the special education referral process than are secondary principals in small districts.

Principals at high school campuses are 30% more likely to understand the legalities related to the discipline of special education students. Principals at the lower level campuses are 35% more likely to know the legally appropriate referral process for special education students.

Superintendents

Part I-Scenarios. Superintendents across Texas were selected for this study. One thousand nineteen (1,019) questionnaires were distributed and 446 returned for a response rate of 40.38%. The vast majority of those responding represented school districts with fewer than 10,000 students. Over 80% of the respondents had more than 20 years of experience in education, but most (40%) had fewer than six years of experience as a superintendent. Approximately 25% of the respondent superintendents possessed a doctoral degree.

Results from the forced-choice scenarios indicate that superintendents demonstrate a lack of knowledge of school law on issues relative to their position. A minimum of 70% correct (8 of 11 choices) on the scenarios was identified as commanding a knowledge of school law issues. The survey revealed that 44.8% (200 of 446) of the superintendents queried identified a minimum of 70% (8) of the legally correct responses to the scenarios. Many superintendents noted on the questionnaire that responses were without the aid of research of assistance from an attorney, which is contrary to what would occur if a "real" situation was presented.

Again, a slightly different picture was presented when each question was analyzed. Seventy percent (70%) of the respondents correctly identifying the legally acceptable answer to the scenario was identified as demonstrating adequate knowledge of school law on the scenario. In 8 of the 11 scenarios presented, the superintendents correctly identified the legally acceptable answer. Those scenarios can best be described as representing the following areas of school law:

- Teacher contracts (89.7% mastered)
- Special education requirements (87.7% mastered)
- Contract Non-renewal-Local (82.5% mastered)
- TOMA-Agenda (81.2% mastered)
- Special education services (78.0% mastered)
- TOMA-Closed session (74.2% mastered)

Five scenarios proved troublesome to the principals. The scenarios in which principals failed to correctly identify the legally correct answer at a rate of 70% were:

- Residency (62.1% mastered)
- Commissioner's powers (47.8% mastered)
- Compulsory attendance (32.1% mastered)
- Contract termination (27.6% mastered)
- Student transportation and liability (15.0% mastered)

Part II-Open-ended Questions. As previously stated, two open-ended questions were posed the superintendents. When asked the question "What aspects of your current responsibilities can more readily result in legal action against a [school official] in your district?" the most frequent responses related to special education. Employee contract issues were a distant second. Table 8 displays the top five most frequent responses from superintendents.

Table 8

Act/Subject	Percentage of Comments
Special education	24.5%
Employee contracts	11.9%
Discipline	10.2%
Transportation	8.1%
Harassment	6.5%

Superintendents-Acts Resulting in Legal Action

Also posed was the question " What areas of school law would [school officials] appreciate having a better background or better understanding?" Once again, special education was mentioned most frequently. Table 9 displays the seven most frequent responses from principals.

Table 9

Subject	Percentage of Comments
Special education	23.2%
Personnel	13.1%
Legal issues (following policy, update on cases, etc.)	10.6%
Employee contracts	8.4%
Finance	5.9%
Student discipline	4.8%
Construction/Vendor contract	4.2%

Secondary Principals-Better Understanding Needed

Discussion

This study found that classroom teachers, secondary principals, and superintendents in Texas do not possess an adequate level of knowledge of legal issues affecting public schools. The study confirms previous research (Terrell, 2001; Gordon, 1996; Daley, 1994; Kuck, 1992; Steele, 1990) within and outside of the state of Texas.

Texas, like most states, does not have specific training requirements in school law for classroom teachers. This was demonstrated in the classroom teachers' indication that teachers need more knowledge in general school law issues. And, as a result, classroom teachers performed poorly on forced-choice responses dealing with legal issues. As a result, teacher preparation programs should weave discussions of legal issues into their curriculum. Further study should be conducted to determine the extent and nature of the training.[5] Although special education issues were a major concern to classroom teachers, it did not appear to be quite the concern as it was for principals and superintendents. Possibly, classroom teachers and administrators view the burden of following special education laws and guidelines as the responsibility of the administration.

Although Texas does not have specific legal training requirements for principals and superintendents, most administrator preparation programs in Texas do include specific courses in public school law.

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[5] The researchers encourage discussion and study on whether "practical" training on specific legal topics or general training on broad legal concepts and issues should be part of the teacher preparation curriculum.

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KEEPING THE COMMITMENT TO INTEGRATION WHILE WALKING THE TIGHTROPE OF STRICT SCRUTINY: MINNESOTA'S NEW DESEGREGATION/INTEGRATION RULE

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KEEPING THE COMMITMENT TO INTEGRATION WHILE WALKING THE TIGHTROPE OF STRICT SCRUTINY: MINNESOTA'S NEW DESEGREGATION/INTEGRATION RULE

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I. WHY DO WE NEED TO CONTINUE TO FOCUS ON RACIAL INTEGRATION AT THE K-12 LEVEL?

A. We are increasingly becoming a nation of "haves" and "have-nots":

- Top quintile of population represents 49.3% of all income (up from 40% in 1977); the bottom 20% only has 3.6% of all income.
- Only the top 40% of the population has achieved more buying power since 1977—everyone else has lost buying power.[1]

B. As a nation, we are becoming increasingly more diverse:

1999: White population: 69%: People of color: 31%

Projection for 2010: White population: 44%: People of color: 56%. Id.

C. At the same time we are becoming more diverse, our public schools are becoming more racially isolated. Even though students of color represent an escalating proportion of the school-age population, their contacts with white students has been diminishing every year for a decade. This is especially problematic, because it reinforces the economic isolation noted above. Districts with few white students tend to have high rates of poverty and low levels of educational attainment. Gary Orfield, Schools More Separate: Consequences of a Decade of Resegregration. The Civil Rights Project, Harvard University (July 2001.)

D. We are in danger of losing the benefits of interracial contact at the K-12 level. These include:

1. **Increased ability to work together; inculcation of civic values.** "Recent surveys show that both white students and students of color tend to report by large majorities that they have learned to study and work together and that they are highly confident about their ability to work in such settings as adults. Students report that they have learned a lot about the other group's background and feel confident about the ability to discuss even controversial racial issues across racial lines." Orfield, supra, citing Michael Kurlender and John T. Yun, Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville. Cambridge Massachusetts: The Civil Rights Project (August 2000).

   An expert in the benefits of integration testified to the following related benefits in a recent case:

   > "The research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvements in race relations, the reduction of prejudicial attitudes, and the achievement of a more democratic and inclusive experience for all citizens... Recent research has identified the critical role of early school experiences in breaking down racial and cultural stereotypes....". Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp 1224, 1236 (W.D. Wash., 2001).

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[1] From a paper presented by demographer Hazel Rienhardt, August 2, 2001 at the conference "Beyond Integration to Inclusiveness."

2. **Greater integration in later life.** Social scientists have conducted many studies which "tend to show that desegregation of schools leads to desegregation in later life including areas that are important to career attainment." Marvin P. Dawkins & Jomills Henry Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 Journal of Negro Education 394 (Summer 1994).

3. **Opportunity to impact the economic divide.** "A recent study of elite law schools shows… that almost all of the black and Latino students who made it into those schools came from integrated backgrounds." Orfield, supra, at 11. Dawkins and Braddock, supra at 401 also found evidence that indicates that elementary and secondary school desegregation has a positive influence on the enrollment of African-Americans in predominately White colleges and universities.

4. **Opportunity for white students and staff to be sensitized.** "In a diverse student body, those who have faced racial prejudice can share that experience with whites who have not. Students are 'sensitized' to practices and attitudes that minorities may regard as racist, and in particular they come to realize how devastating it is to be the target of a racial slur. Members of the majority acquire the ability to see events from a minority's perspective. Students begin to understand how isolated immigrants not fluent in English must feel, and why certain non-western customs are valuable to those who observe them." Elizabeth Hull, infra, citing Roscoe C. Howard, Jr., Getting It Wrong: Hopwood v. Texas and Its Implications for Racial Diversity in Legal Education and Practice, 31 New Eng. L. Rev. 831 (1997).

E. **Conversely, racially imbalanced schools are sometimes correlated with unequal access to educational opportunity**, such as having teachers who are much more likely to be teaching a subject they did not study and with which they have had little experience. Orfield, supra, citing Beth Aronstamm Young and Thomas M. Smith, The Social Context of Education, Findings from the Condition of Education 1997, National Center for Education Statistics 97-991 (1997.)

II. PRESENT DEVELOPMENTS.

A. **Courts are dissolving long-standing desegregation plans and imposing strict scrutiny standards that seriously impact the ability to use race-based assignments at the K-12 level.** See e.g. Elizabeth Hull, Out on a Lonely Limb: The Piscataway Board of Education's Fight for Educational Diversity, 2000 Det. L. Rev. 407 (Summer 2000).207 (2000); Gary Orfield, Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education*. New York: New Press (1996).

III. WHAT IS THE "CORRECT" STANDARD IN ASSESSING WHETHER K-12 PUBLIC SCHOOLS MAY USE RACE AS A FACTOR IN STUDENT ASSIGNMENTS?

GENERAL RULE: Government policies based on racial classifications, even if made for a benign purpose, are subject to strict scrutiny. The government must show that the policy in question is justified by a compelling interest, and that the policy is narrowly tailored[2] to address that compelling interest. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors v. Pena, 515 U.S. 1879 (1995).

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[2] The "narrowly tailored" standard has itself been the subject of much litigation, although that portion of the test will not be the subject of this discussion, since it is often decided on very fact-specific bases. As a point of reference, it may be useful to note that at least two circuit courts have used the following test to determine whether a race-based policy is narrowly tailored: "When reviewing whether a state racial classification is narrowly tailored, we consider factors such as (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties." Tuttle v. Arlington School Board, 195 F.3d 698, 706 (4th Cir. 1999), citing United States v. Paradise, 480 U.S. 149, 171 (1987).

THE QUESTION: Does achieving greater diversity in the racial composition of K-12 schools constitute a "compelling interest"?

A. SUPREME COURT HOLDINGS.

1. The U.S. Supreme Court has never directly considered whether diversity is a compelling state interest in the context of a K-12 case. Wessman v. Gittens, 160 F.3d 790 (4th Cir. 1998); Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999).

2. There is uncertainty and perhaps even some division in the circuits on this issue. The following Supreme Court decisions are most frequently relied on to find that achieving or maintaining diversity in student enrollments is not a compelling interest:

- Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986). The Court considered the constitutionality of a layoff provision that gave preference to teachers based on their race. A plurality of the Court indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." Id., at 274. The Court reasoned that having role models for students of color was not a compelling state interest.

- City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). A majority of Justices invalidated a city ordinance setting aside thirty percent of its contracting work for minority-owned businesses. The Court found that remedying the distant past effects of general societal discrimination was insufficient to support a preferential contracting program. The Court also held that "strict scrutiny" would be used to judge the constitutionality of "all race-based action by state and local governments." Adarand, infra, describing the holding in Croson.

- Adarand Constructors v. Pena, 515 U.S. 1879 (1995). The Court considered the constitutionality of a federal government policy that awarded general contractors on government projects a financial incentive to hire minority subcontractors. The Court held that any federal race-based classification, even those to bestow a protection or benefit, are inherently suspect and must withstand an "exacting analysis" in order to be upheld. To pass scrutiny, all racial classifications must 1) satisfy a "compelling governmental interest", and 2) be narrowly tailored to meet that interest. Id. at 2113.

CASE TO WATCH: Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), cert. granted, 121 S.Ct. 1401 (2001). This is the fourth incarnation of the Adarand decision. In this case, the Tenth Circuit found that the federal government did establish a compelling interest in remedying the effects of discriminatory practices by using race-based measures to encourage the hiring of minority sub-contractors. Although the court does not address the precise question of whether other interests may be compelling, the Supreme Court may use the occasion to further clarify the issue. See Johnson v. Board of Regents of the University of Georgia, 2001 U.S. App. LEXIS 19154 (11th Cir., August 27, 2001).

3. The following Supreme Court precedent is sometimes used to argue that some form of "diversity" may still be a compelling interest for race-based decisions at the K-12 level:

- Swann v. Charlotte-Mecklenburg Bd of Educ., 402 U.S. 1 (1971). This case involved the constitutionality of using racial quotas to address de jure segregation. The Court found that although the Constitution does not require every school in the district to reflect the racial composition of the entire system, using racial quotas as a starting point to correct past discrimination was permissible. In dicta, the Court noted that "school authorities have broad authority to formulate and implement educational policy", including prescribing a specific percentage of students of color to attend each school "in order to prepare students in a pluralistic society." Id. at 16. This language is used to argue that the unique mission of K-12 schools, and their broad authority to make policy, distinguishes them from other situations where courts have decided diversity is not a compelling interest. See e.g. Kevin Brown, Symposium: Education and the Constitution: Shaping Each Other and the Next Century: Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary School Education. 34 Akron L. Rev. 37 (2000).

- Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978). The Court considered whether race could be considered as one of many factors in the University's admissions policy in order to achieve diversity in the student enrollment. Justice Powell, in a concurring opinion, wrote that "diversity furthers a compelling state interest." Id., at 313. Four justices concurred in the view that race may be considered in an admissions program, and even suggested that race conscious policies may be used to increase representation. Id., at 296, n.36, 3654-66, 369. The other four justices found that the admission program was invalid, but decided the case on statutory rather than constitutional grounds.

  The applicability of this precedent at the K-12 level has been debated, as has the continued viability of Bakke as precedent in light of more recent Supreme Court decisions. But as one appellate court has noted: "Although no other Justice joined in the diversity portion of Powell's concurrence, nothing in Bakke or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest.... The Supreme Court did not directly address either the question of whether diversity is a compelling interest or the current precedential value of Bakke in its most recent affirmative action equal protection opinion." Tuttle v. Arlington School Board, 195 F.3d 698, 705, (4th Cir. 1999).[3]

- On different occasions individual Justices have written about diversity approvingly. See e.g. Wygant, supra, at 286 ("nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently... 'compelling' to sustain the use of affirmative action policies.")(O'Connor J., concurring); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 547, 614 (1982); Metro Broad., Inc. v. FCC 497 U.S. 547 (1990); Justice Steven's dissent in Adarand, 515 U.S. 200, 258.

B. Most federal courts that have considered whether diversity can be a compelling interest have either decided the issue on other grounds, or have indicated disfavor with the idea that diversity can be a compelling interest at the K-12 level.

1. **D.C. CIRCUIT:**

- Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d. 344 (D.C. Cir. 1998) (although this is not an education case, the reasoning arguably puts the D.C. Circuit in this category.) The court considered the constitutionality of a FCC regulation that required licensees to make additional efforts to recruit minorities. The FCC found that the church-licensee failed to meet the required EEO recruiting efforts. The Court found that the question was not whether the regulations "...required hiring in accordance with fixed quotas: rather it is whether they oblige stations to grant some degree of preference to minorities in hiring." Id. at 23. In holding that the EEO regulations were unconstitutional, the court noted that "We do not think diversity can be elevated to the 'compelling' level, particularly when the Court has given every indication of wanting to cut back Metro Broadcasting." Id. at 35.

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[3] For a more detailed analysis of the differing opinions in Bakke, see Johnson v. Board of Regents of the University of Georgia, 2001 U.S. App. LEXIS 19154 (11th Cir.,.August 27, 2001).

2. FIRST CIRCUIT:

- Wessman v. Gittens, 160 F.3d 790 (1ST Cir. 1998)(K-12 case). Court considered the constitutionality of Boston Latin School's admissions process, which allocated half of its seats on the basis of "flexible racial/ethnic" guidelines. While refusing to find that the diversity rationale in Bakke has been overruled, the court made a clear distinction between "diversity" and "racial balancing". Finding that the policy in question was in fact "racial balancing", the court noted in its analysis (although not in its holding) that racial balancing is "extremely suspect" as a constitutional matter, and expressed "considerable skepticism" about whether there may be circumstances "under which a form of racial balancing could be justified." Id. at 799-800. The court assumed without deciding that diversity may be a compelling interest, but determined that the policy was unconstitutional on other grounds.

3. THIRD CIRCUIT:

- Taxman v. Board of Education, 91 F.3d 1547 (3d. Cir. 1996), cert. granted, 117 S.Ct. 2056 (1997)(K-12 employment case). The court found that the school district's affirmative action policy of preferring minority teachers over equally-qualified white teachers in layoff decisions was prohibited by Title VII. The court noted that the policy had been adopted to promote racial diversity, not as a remedy for past discrimination. Id. at 1654-65.

4. FOURTH CIRCUIT:

- Podberesky v. Kirwan, 38 F.3d 1147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995) (Post-secondary case). University of Maryland offered a merit scholarship program solely for African American students. The Fourth Circuit declared the race-based preference unconstitutional, noting that race is the "most pernicious … criteria by which men and women can be judged."

- Tuttle v. Arlington School Board, 195 F.3d 698 (4th Cir. 1999)(K-12 case).

  The court considered whether an oversubscribed school could use a weighted lottery in the admissions process to promote racial, socioeconomic and ethnic diversity. The court noted that the Supreme Court has not yet decided whether diversity could be a compelling interest, and therefore decided the case on the grounds that the policy was not narrowly tailored. "Since we conclude below that the Policy was not narrowly tailored, we leave the question of whether diversity is a compelling interest unanswered." Id. at 705.

  See also Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130 (4th Cir. 1999)(K-12 case)("Whether diversity is a compelling interest remains unresolved.")

5. FIFTH CIRCUIT:

- Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), petition for cert. denied, 518 U.S. 1033 (Post-secondary case). The court found that any racial preferences in admissions policies at a state-operated law school could not be sustained based on the argument that diversity is a compelling state interest. Holding based on three reasons: 1) Bakke never presented the view of a majority of the Court; 2) Bakke not binding, since no case since Bakke has accepted diversity as a compelling state interested under a strict scrutiny analysis; 3) the court argued that there are strong policy reasons for prohibiting racial set-asides or quotas to promote diversity. The court relied on the reasoning in Podberesky, supra.

6. SIXTH CIRCUIT (District Court decisions):

- Equal Open Enrollment Ass'n v. Board of Educ., 937 F.Supp 700 (N.D. Ohio 1996). District court considered Akron School Board's open enrollment policy that prohibited white students from leaving the district because of a concern that white flight under the plan would lead to racial isolation.

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The question before the court was whether the "prevention of imminent racial segregation is a compelling state interest." Id. at 705. The court noted that "absent finding of past discrimination, no race-based regulation has been upheld." Id. at 706 (citations omitted).

- Grutter v. Bollinger, 137 F.Supp. 2d 874 (E.D. Mich. 2001)(Post-secondary case). The court considered the constitutionality of an admissions policy at the University of Michigan Law school that used race as a factor in considering applicants. In striking down the policy, the court noted: "While the status of Justice Powell's endorsement of the diversity rationale is debatable, the court is convinced that [in the sections of the opinion dealing with the diversity rationale] Justice Powell was speaking only for himself, not for a majority of the Supreme Court. A majority of the Court has never recognized racial diversity in university admissions as a compelling state interest. And as this court noted in its March 27, 201 opinion, post-Bakke Supreme court decision cast further doubt on the constitutionality of any use of race that is not strictly remedial." Id. at 876 [citations omitted].

7. SEVENTH CIRCUIT:

- People Who Care v. Rockford Board of Education, 111 F.3d 528(7th Cir. 1997)(K-12 case). The court struck down racial quotas in student assignments to certain programs and in disciplinary proceedings. With regard to the racial quotas for student discipline (which required that the district not refer a higher percentage of minority than white students for discipline without meeting certain criteria) the court stated: "Racial … quotas violate equity in its root sense…. They place race at war with justice. They teach schoolchildren an unedifying lesson of racial entitlements." Id. at 538.

- Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001). (Employment case). In this case the county had adopted an ordinance that required a minimum of 30% of the total value of any construction contract be awarded to entities at least 51% owned by members of certain minority groups. The court decided the case on other grounds, but noted: "Whether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled. The Supreme Court will have to decide the question eventually…." Id. at 643.

8. NINTH CIRCUIT

- Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir,. 1997), cert. denied, 118 S.Ct. 17 (1997). The court considered whether California's newly enacted "Proposition 209" denied minorities and women equal protections because of its ban on the use of preferential treatment based on race and sex (among other categories)[4]. The court found that "Impediments to preferential treatment do not deny equal protection." Id. at 1445.

- Ho v. San Francisco Unified School District, 147 F.3d 854 (9th Cir. 1998)(K-12 case) Court considered continued implementation of a consent decree that required racial balancing at various schools within the district. The court engaged in a lengthy analysis regarding why governmental use of race is generally bad policy (pp. 862-864), and remanded the case for trial with the following caveats: "…the Supreme Court has not banished race altogether from our governmental systems. The concept, so long the instrument of governmental evil, so fraudulently promoted by pseudo-science, so corrosive of the rights of persons, may still be employed if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race." Id. at 864.

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[4] Proposition 209 provided in relevant part that "…the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."

But see Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp 1224 (W.D. Wash., 2001); Hunter v. The Regents of the Univ. of Calif., 190 F.3d 1061 (9th Cir. 1999) (discussion in part "C" below).

9. TENTH CIRCUIT:

- Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), cert. granted, 121 S.Ct. 1401 (2001)(discussed above in section III.A.)

10. ELEVENTH CIRCUIT:

- Johnson v. Board of Regents of the University of Georgia, 2001 U.S. App. LEXIS 19154 (11th Cir., August 27, 2001). The court considered the University's policy of giving preferential treatment to non-white and male applicants in order to achieve greater diversity in student enrollment. "We think it clear that the status of student body diversity as a compelling interest justifying a racial preference in university admissions is an open question in the Supreme Court and in our Court.... It is possible that the important purpose of public education and the expansive freedoms of speech and thought associated with university environment—recognized in other decisions by the Court—may on a powerful record justify treating student body diversity as a compelling interest. The weight of recent precedent is undeniably to the contrary, however." Id. at 15.

C. Notwithstanding the decisions above, **very recently, some federal courts have found that diversity, or some related interest, might be a compelling interest.** Some legal scholars have been making similar arguments.

SECOND CIRCUIT:

- Brewer v. West Irondequiot Central School District, 212 F.3d 738 (2d. Cir. 2000). The court considered a voluntary interdistrict transfer program that only allowed minority students to transfer out to the suburban schools, and non-minority students to transfer into the city schools. The district court found that the main purpose of the policy was to reduce racial isolation in the participating schools. First, the court noted that it was bound by earlier precedent that clearly established that reducing de facto segregation serves a compelling interest (citing Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574 (2d Cir. 1984)). Second, it found that the Supreme Court had not issued a decision dealing with permissible race-based justifications in the educational context, or for race-based classifications generally. Id. at 752. The court therefore vacated the injunction issued by the lower court against the policy, and the case was sent back for trial.

NINTH CIRCUIT:

- Hunter v. The Regents of the Univ. of Calif., 190 F.3d 1061 (9th Cir. 1999)(Post secondary and K-12 case), holding that California had a sufficiently compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools and concluding that the school's consideration of race/ethnicity in its admission process was narrowly tailored to further that interest.

- Parents Involved in Community Schools v. Seattle School District No. 1,
  137 F. Supp 1224 (W.D. Wash., 2001). The district court considered Seattle's "open choice" program for students that enabled them to rank order their choice of schools. The program used a series of tie-breaking factors if schools were over-subscribed. Although the first tie breaker was not race-based (sibling preference), the second tiebreaker, used at "racially out of balance" schools, was

whether the student's attendance at the school will help mitigate the imbalance of the racial makeup. The third and fourth tie-breakers were also non-racial. Citing a footnote in Wilson, supra, and Swann, supra, the court found: 1) that the program was not a preference based on race, but merely a "reshuffling" that applied equally to all races; 2) that there is a compelling state interest in "mitigating the historical effects on its high schools of the residential segregation of Seattle's neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers." Id. at 1223.

- See also Clark v. Board of Educ. Of Little Rock, 705 F.2d 265, 271(8th Cir. 1983). The court relied in part on Jackson v. Ambach, supra, and noted that 'although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, it may be taken into account in an attempt to promote integration." Given that this case pre-dates Croson and Adarand, it is not clear whether the Eighth Circuit would still find this good law.

- Finally, see Kevin Brown, Symposium: Education and the Constitution: Shaping Each Other and the Next Century: Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary School Education. 34 Akron L.Rev. 37 (2000).

IV. SIDESTEPPING THE STRICT SCRUTINY DILEMMA: MINNESOTA'S RULE (Minn. Rules pt. 3535.0100-.0800)(follows this outline)..

A. Identification of students.

Each year districts report their enrollments; student's race is determined first by self-identification; alternatively by parent identification, or as a last alternative, identification processes developed by the district. This is reported to the State, which then calculates the numbers necessary to determine whether schools or districts are racially isolated.

B. Review of "Racially Isolated" Schools

1. Automatic agency review when school's SOC enrollment is 20% or more than the district average.[5]

2. Agency uses Green [6] factors to make initial determination of whether isolation is the result of intentional, discriminatory conduct. If it is, agency makes specific findings; orders SD to develop plan to eliminate segregated condition.

3. If isolation is not the result of intentional discriminatory conduct, District convenes "Community Collaboration Council" to identify integration issues and develop plan to address.

4. SD reviews and (generally) adopts recommendations of CCC.

5. Evaluation of program by state and report to legislature on outcomes; can be followed with recommendations for incentives (or otherwise.)

C. Review of Racially Isolated School Districts.

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[5] After working with the representatives of the American Indian community, rule drafters were able to incorporate a very unique approach to determining whether enrolled American Indian students should be counted as part of the percentages for determining racial isolation. See Minn. Rules pts. 3535.0110 subp. 9.B; 3535.0160 subp. 1.B; and 3535.0170 subp. 1.B.

[6] Green v. County School Board, 391 U.S. 430 (1968).

1. Rule application triggered when any district has more than 20% SOC as compared to its adjacent neighbors.

2. In those cases, the isolated district and adjacent districts form Multi-District Collaboration Councils (MDCC) to identify integration issues, and develop joint plans for cross-district integration efforts.

3. Each participating district is required to approve the plan and submit a budget for approval to the state agency.

4. Evaluation of program by state and report to legislature on outcomes; can be followed with recommendations for incentives (or otherwise.)

D. Funding. In 2000, State paid $93 per pupil unit in each district affected by the rule. Many received an influx of a great deal of money to fund their new initiatives.

V. BENEFITS and OUTCOMES (see charts for summaries of actions taken thus far.)

- Does not require or encourage use of race-based measures. Since state only approves budget, and not plans, may insulate state from liability in the event that school districts do use race-based measures in their plans.
- Enables state and school districts to monitor and perhaps even anticipate demographic shifts.
- Requires inter-district planning and actions to address urban isolation, as well as isolation beginning to develop in the rural areas.
- Involves those most directly affected in identifying the issues raised by the isolation and how those issues should be addressed.
- Recognizes that voluntary efforts are more likely to produce sustained interracial contact without resulting in unintended consequences.
- Recognizes that students can achieve some of the benefits of integration even outside of the classroom.
- Enables the state agency to make an annual determination of whether schools are intentionally segregated, to help address the need for equal access to educational opportunity.
- Keeps this important issue "on the screen" for policy makers and institutionalizes ongoing voluntary integration state-wide.

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MINNESOTA RULES PARTS 3535.0100 -.0180: DESEGREGATION/INTEGRATION

3535.0100 PURPOSE.

The purpose of parts 3535.0100 to 3535.0180 is to:

A. recognize that the primary goal of public education is to enable all students to have opportunities to achieve academic success;

B. reaffirm the state of Minnesota's commitment to the importance of integration in its public schools;

C. recognize that while there are societal benefits from schools that are racially balanced, there are many factors which can impact the ability of school districts to provide racially balanced schools, including housing, jobs, and transportation;

D. recognize that providing parents a choice regarding where their children should attend school is an important component of Minnesota's education policy;

E. recognize that there are parents for whom having their children attend integrated schools is an essential component of their children's education;

F. prevent segregation, as defined in part 3535.0110, subpart 9, in public schools;

G. encourage districts to provide opportunities for students to attend schools that are racially balanced when compared to other schools within the district;

H. provide a system that identifies the presence of racially isolated districts and encourage adjoining districts to work cooperatively to improve cross-district integration, while giving parents and students meaningful

I. work with rules that address academic achievement, including graduation standards under chapter 3501 and inclusive education under part 3500.0550, by providing equitable access to resources.

3535.0110 DEFINITIONS.

Subpart 1. Scope. As used in parts 3535.0100 to 3535.0180, the terms defined in this part have the meanings given them.

Subp. 2. Enrolled American Indian students. "Enrolled American Indian students" means students who live on or off a reservation and are enrolled in a federally recognized tribe. Enrolled American Indian students have dual status as protected students under subpart 4 and members of sovereign nations.

Subp. 3. Commissioner. "Commissioner" means the commissioner of the Department of Children, Families, and Learning.

Subp. 4. Protected students. "Protected students" means:

A. students who self-identify or are identified in the general racial categories of African/Black Americans, Asian/Pacific Americans, Chicano/Latino Americans, and American Indian/Alaskan Native; and

B. multiracial students who self-identify or are identified as having origins in more than one of the categories described in item A or as having origins in one of the categories described in item A and in the category of Caucasian.

Subp. 5. Racial balance. "Racial balance" means the increased interaction of protected students and white students within schools and between districts that is consistent with the purposes of parts 3535.0160 to 3535.0180.

Subp. 6. Racially identifiable school within a district. "Racially identifiable school within a district" means a school where the enrollment of protected students at the school within a district is more than 20 percentage points above the enrollment of protected students in the entire district for the grade levels served by that school.

Subp. 7. Racially isolated school district. "Racially isolated school district" means a district where the districtwide enrollment of protected students exceeds the enrollment of protected students of any adjoining district by more than 20 percentage points.

Subp. 8. School. "School" means a site in a public school district serving any of kindergarten through grade 12. For purposes of parts 3535.0160 to 3535.0180 only, school does not mean:

A. charter schools under Minnesota Statutes, section 124D.10;

B. area learning centers under Minnesota Statutes, section 123A.05;

C. public alternative programs under Minnesota Statutes, section 126C.05, subdivision 15;

D. contracted alternative programs under Minnesota Statutes, section 124D.69;

E. school sites specifically designed to address limited English proficiency;

F. school sites specifically designed to address the needs of students with an individual education plan (IEP); and

G. secure and nonsecure treatment facilities licensed by the Department of Human Services or the Department of Corrections.

Subp. 9. Segregation. "Segregation" means the intentional act or acts by a school district that has the discriminatory purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student's race and that causes a concentration of protected students at a particular school.

A. It is not segregation for a concentration of protected students or white students to exist within schools or school districts:

(1) if the concentration is not the result of intentional acts motivated by a discriminatory purpose;

(2) if the concentration occurs at schools providing equitable educational opportunities based on the factors identified in part 3535.0130, subpart 2; and

(3) if the concentration of protected students has occurred as the result of choices by parents, students, or both.

B. In addition to the factors in item A, it is not segregation for concentrations of enrolled American Indian students to exist within schools or school districts:

(1) if the concentration exists as a result of attempting to meet the unique academic and culturally related educational needs of enrolled American Indian students through programs developed pursuant to the federal government's trust relationship with American Indian tribes or through an agreement with an American Indian tribal government; and

(2) the concentration exists as the result of voluntary choices made by American Indian parents, enrolled American Indian students, or both.

3535.0120 DUTIES OF DISTRICTS.

Subpart 1. Report. A school district shall annually submit to the commissioner, concerning each school site within its district, a report that includes:

A. the racial composition of each school within its district; and

B. the racial composition of the grade levels served by each of the schools.

The report shall be submitted according to the Minnesota Automated Reporting Student System (MARSS) deadlines as established annually by the commissioner and noticed to all districts.

Subp. 2. Data collection. A district shall collect for all students except American Indian students in subpart 3, the information required in subpart 1 by using one of the following racial identification procedures in the following order:

A. parent or guardian identification;

B. age-appropriate student self-identification, when parent or guardian identification is not an option;

C. if parent, guardian, or student self-identification methods are not possible, sight counts administered by the principal or designee, pursuant to written guidelines developed by the district.

Subp. 3. American Indian students. In districts where the American Indian population is ten or more students, the parent education committee under Minnesota Statutes, section 124D.78, subdivision 1, in consultation with the American Indian parents the committee represents, may select as their identification procedure one of the following:

A. parent or guardian self-identification;

B. the process for identification specified in United States Code, title 20, section 7881; or

C. the racial identification procedure used by the district for other students.

3535.0130 DUTIES OF COMMISSIONER.

Subpart 1. Review of data. The commissioner shall review the data provided by a school district under part 3535.0120 within 60 days of its receipt. If the commissioner determines that there is a racially identifiable school within a district, or if the commissioner receives a complaint alleging that a district is engaged in acts of segregation, the commissioner shall request further information to determine whether the racial composition at the school or schools in question results from acts motivated at least in part by a discriminatory purpose. The commissioner's finding of a discriminatory purpose must be based on one or more of the following except that the commissioner shall not rely solely on item D or E, or both:

A. the historical background of the acts which led to the racial composition of the school, including whether the acts reveal a series of official actions taken for discriminatory purposes;

B. whether the specific sequence of events resulting in the school's racial composition reveals a discriminatory purpose;

C. departures from the normal substantive or procedural sequence of decision making, as evidenced, for example, by the legislative or administrative history of the acts in question, especially if there are contemporary statements by district officials, or minutes or reports of meetings that demonstrate a discriminatory purpose;

D. whether the racial composition of the school is the result of acts which disadvantage one race more than another, as evidenced, for example, when protected students are bused further or more frequently than white students; and

E. whether the racially identifiable composition of the school was predictable given the policies or practices of the district.

Subp. 2. District information. In order to determine whether a racially identifiable school exists as the result of acts motivated by a discriminatory purpose, the commissioner shall request and the district shall provide the following information related to the factors described in subpart 1:

A. information about how students are assigned to schools within the district, including:

(1) for schools which have been newly added or renovated or if attendance zones have changed, a description of what the attendance zones were and what the racial composition of each zone was at the time the school was planned and added or renovated;

(2) a description of the assignment and transfer options at each of the schools serving the grade levels in question, and the outreach efforts that were made to ensure parents received information about and were able to understand the availability of those options; and

(3) a comparison of the racial composition of the attendance area of the school in question as it relates to the composition of the district as a whole;

B. a list of curricular offerings;

C. a list of the extracurricular options available at each of the schools serving the grade levels in question;

D. a list that breaks down, by race and school, the teachers assigned to all of the schools serving the grade levels in question and, considering the average percentage of teachers of color in the district, an explanation of any concentration of teachers of color assigned at a school at issue;

E. a list that shows how the qualifications and experience of the teachers at the racially identifiable school compares to teachers at the sites which are not racially identifiable;

F. evidence that the racially identifiable school has been provided financial resources on an equitable basis with other schools which are not racially identifiable;

G. a comparison of the facilities, materials, and equipment at the racially identifiable school with schools that are not racially identifiable;

H. information that would allow the commissioner to determine whether the extent of busing is disproportionate between white students and protected students; and

I. any nondiscriminatory circumstances that explain why a particular school has exceeded the districtwide enrollment of protected students by more than 20 percentage points.

Subp. 3. Integrated alternatives. If the enrollment of protected students at a school is more than 25 percent above the enrollment of protected students in the entire district, or if the enrollment of protected students exceeds 90 percent at any given school, whichever is less, the district must provide affirmative evidence to the commissioner that all students in that school have alternatives to attend schools with a protected student enrollment that is comparable to the districtwide average.

3535.0140 RESPONSE OF DISTRICTS. School districts shall respond to the commissioner's request for information under part 3535.0130 within 60 days of its receipt. If supplemental information is requested by the commissioner, the district must respond within 30 days of the receipt of the request.

3535.0150 DEVELOPMENT OF PLAN FOR MANDATORY DESEGREGATION; ENFORCEMENT.

Subpart 1. **District plan.** If the commissioner determines that segregation exists, the district shall provide a plan within 60 days that proposes how it shall remedy the segregation. The plan shall address the specific actions that were found by the commissioner to contribute to the segregation. The plan shall be developed in consultation with the commissioner. If the commissioner rejects any or all of the plan, the commissioner shall provide technical assistance to help the district revise the plan. However, if the district and the commissioner cannot agree on a plan within 45 days after the original plan was rejected, the commissioner shall develop a revised plan to remedy the segregation that the district shall implement in the time frame specified by the commissioner. A finding of segregation, or a finding that the district's initial plan is inadequate, shall be based on written findings of fact and conclusions of law issued by the commissioner.

Subp. 2. **Remedy.** If the commissioner has made a finding of segregation, student assignments based on race that are made to remedy the finding of segregation are permissible in a plan for mandatory desegregation, so long as they are narrowly tailored to remedy the act of segregation.

Subp. 3. **Extension.** The commissioner may extend the time for response from a district under parts 3535.0140 and 3535.0150 if compliance with the deadline for response would impose an undue hardship on the district, for example, if the information is not easily ascertainable or the plan requires a complex remedy that includes consultation with outside sources.

Subp. 4. **Enforcement of desegregation.** If the district fails to submit data required by the commissioner, fails to provide or implement a plan to remedy the segregation, or fails to implement a plan developed by the commissioner as provided in subpart 1, the commissioner must:

A. notify the district that its aid shall be reduced pursuant to Minnesota Statutes, section 127A.42;

B. refer the finding of segregation to the Department of Human Rights for investigation and enforcement; and

C. report the district's actions to the education committees of the legislature by March 15 of the next legislative session with recommendations for financial or other appropriate sanctions.

3535.0160 INTEGRATION OF RACIALLY IDENTIFIABLE SCHOOLS NOT THE RESULT OF SEGREGATION.

Subpart 1. Notice to district of plan including voluntary measures.

A. If a racially identifiable school reviewed under part 3535.0130 is not the result of segregation, the district shall be notified that it must develop and submit a plan to the commissioner for review that provides options to help integrate the racially identifiable school. The format of the plan shall be determined by the commissioner.

B. A racially identifiable school is not required to develop and submit a plan if the school is racially identifiable only as a result of:

(1) a concentration of enrolled American Indian students that exists as a result of attempting to meet the unique academic and culturally related educational needs of enrolled American Indian students through programs developed pursuant to the federal government's trust relationship with American Indian tribes or through an agreement with an American Indian tribal government; and

(2) the concentration exists as the result of voluntary choices made by American Indian parents, enrolled American Indian students, or both.

A racially identifiable school with a concentration of enrolled American Indian students is required to develop and submit a plan if the school is also racially identifiable as a result of the enrollment of other protected students excluding the enrollment of American Indian students.

Subp. 2. Community collaboration council. The district shall establish and use a community collaboration council to assist in developing the district's plan under this part. The council shall be reasonably representative of the diversity of the district. In communities with ten or more American Indian students, representation from the American Indian parent committee under Minnesota Statutes, section 124D.78 is required on the community collaboration council. If a district has an existing committee whose composition reasonably reflects the diversity of the district, for example, school site councils or district curriculum advisory councils, that committee may be used to provide the planning required by this part. The community collaboration council shall identify ways of creating increased opportunities for interracial contact, and establish goals for meeting this objective. After identifying these opportunities and goals, the council shall develop a plan for integration at each school that may include, for example, options under subpart 3.

Subp. 3. District plan.

A. After receiving the plan required under subpart 2 from its community collaboration council, the district shall provide a plan to the commissioner that describes how the goal of increased opportunities for interracial contact between students will be met, and the integration efforts the district plans to implement at each racially identifiable school. The plan shall be written and adopted by the end of the academic year in which the district received notice under subpart 1, or six months later, whichever is longer. The plan shall include:

(1) the extent of community outreach that preceded the plan;

(2) integration issues identified;

(3) action goals of the integration effort;

(4) how the action goals will be or are being accomplished.

B. All plans under this part must be educationally justifiable and contain options for intradistrict integration that may include, for example:

(1) duplicating programs that have demonstrated success in improving student learning at schools that are racially identifiable;

(2) providing incentives to help balance racially identifiable schools, for example, providing:

(a) incentives to low-income students to transfer to schools that are not racially identifiable;

(b) transportation; and

(c) interdistrict opportunities and collaborative efforts with other districts;

(3) providing incentives to teachers to improve the distribution of teachers of all races at schools across the district, including:

(a) staff development opportunities;

(b) strategies for attracting and retaining staff who serve as role models; and

(c) strategies for attracting and retaining staff who have a record of success in teaching protected students, low-income students, or both;

(4) greater promotion of programs provided at racially identifiable schools designed to attract a wide range of students;

(5) providing smaller class sizes, greater counseling and support services, and more extracurricular opportunities and other resources at racially identifiable schools as compared to schools that are not racially identifiable or at schools with a higher concentration of low-income students; and

(6) providing programs promoting instruction about different cultures, including options uniquely relevant to American Indian students, including, for example, American Indian language and culture programs under Minnesota Statutes, section 126.48. The format of the integration plan shall be consistent with, and if possible included into a district's comprehensive plan.

Subp. 4. Commissioner's duties.

A. The commissioner shall:

(1) evaluate any plans developed under this part at the end of each academic year after which a plan is implemented to determine whether the collaboration plan was implemented and whether the goals have been substantially met;

(2) each academic year after a plan is implemented, report to the house and senate education committees any reduction in the percentage of protected students at racially identifiable schools; and

(3) each academic year after a plan is implemented, report to the house and senate education committees if the enrollment of protected students remains constant or increases at racially identifiable schools.

B. The commissioner may recommend financial incentives that are aimed at compensating or rewarding districts for programs or activities that have been successful.

C. The commissioner may recommend legislative action to address the condition of racially identifiable schools within the district.

Subp. 5. Timeline. Each integration plan shall remain in place for three years from the date of review by the commissioner, unless earlier modified by the district and reviewed by the commissioner. Schools that are newly identified as racially identifiable or that were included in a plan under this part but remain racially identifiable after three years from the date of review by the commissioner shall be subject to the procedures outlined in parts 3535.0130 to 3535.0160.

Subp. 6. Schools that did not meet earlier goals. Schools that were included in a plan under this part but remain racially identifiable after three years from the date of review by the commissioner shall work in consultation with the commissioner to develop a new plan that shall include an analysis of why the previous plan did not achieve its goals, a list and explanation of new or continuing barriers to achieving the plan's goals, and a new plan and rationale for achieving the goals of the plan.

3535.0170 INTEGRATION OF RACIALLY ISOLATED SCHOOL DISTRICTS.

Subpart 1. Evaluation.

A. The commissioner shall annually evaluate the enrollment of protected students in each district to determine whether the district as a whole is racially isolated. If the commissioner determines that a district is racially isolated, as defined in part 3535.0110, subpart 7, the commissioner shall immediately notify the district and its adjoining districts. The commissioner may also send notice to other districts that are not adjoining if the commissioner determines that it would be geographically feasible for such districts to participate in cross-district planning. Districts that are not adjoining may choose whether to participate in the cross-district planning.

B. A racially isolated district shall not be required to follow subparts 2 to 8 if the district is isolated only as a result of the enrollment of American Indian students whose unique academic and culturally related educational needs are being addressed by district programs and the district has established a parent committee under Minnesota Statutes, section 124D.78. A district racially isolated as a result of the enrollment of American Indian students shall be required to follow subparts 2 to 8, if the district is also racially isolated as a result of the enrollment of other protected students excluding the enrollment of American Indian students.

Subp. 2. Establishment of multidistrict collaboration council. Upon receiving notice under subpart 1, the isolated and adjoining districts shall establish a multidistrict collaboration council, as provided in subpart 3, to develop a plan under this part. The council shall work as provided under subpart 5 to identify ways to offer cross-district opportunities to improve integration.

Subp. 3. Membership of multidistrict collaboration council. Each isolated district and each of its adjoining districts shall appoint individuals to participate in the multidistrict collaboration council. The council shall be reasonably representative of the diversity of the participating districts. If any of the participating districts have an American Indian parent committee formed under Minnesota Statutes, section 124D.78, a representative of those committees shall also be appointed.

Subp. 4. Alternatives to a multidistrict collaboration council.

A. Participating districts that are members of joint powers boards that have advisory councils meeting the requirements of subpart 3 may use those joint powers boards and advisory councils in lieu of creating a new council under subpart 2.

B. Participating districts that have an existing committee whose composition reflects the membership requirements of subpart 3, may use this committee in lieu of creating a new council under subpart 2.

Subp. 5. Council cooperation and plan. The multidistrict collaboration council shall identify ways of creating increased opportunities for interracial contact and establish goals for meeting this objective. After identifying these opportunities and goals, the council shall develop a joint collaboration plan for cross-district integration that may include the incentives contained in subpart 6, item B.

Subp. 6. District plan.

A. After receiving the plan required in subpart 5 from its council, each district shall review, modify if necessary, and ratify the integration plan. Each district shall provide a plan to the commissioner that describes how the goal of greater opportunities for interracial contact between students will be met and that describes the interdistrict integration efforts the district plans to implement. The plan shall be completed and ratified no longer than 12 months after the district receives notice under part 3535.0180, subpart 1. The plan shall include:

(1) the extent of community outreach that preceded the interdistrict plan;

(2) cross-district integration issues identified;

(3) goals of the integration effort; and

(4) how the goals will be or are being accomplished.

B. All collaboration plans under this part must be educationally justifiable and contain options for interdistrict integration that may include, for example:

(1) providing cooperative transportation that helps balance racially isolated districts;

(2) providing incentives for low-income students to transfer to districts that are not racially isolated;

(3) developing cooperative magnet programs or schools designed to increase racial balance in the affected districts;

(4) designing cooperative programs to enhance the experience of students of all races and from all backgrounds and origins;

(5) providing cooperative efforts to recruit teachers of color, and encouraging teacher exchanges, parent exchanges, and cooperative staff development programs;

(6) encouraging shared extracurricular opportunities, including, for example, community education programs that promote understanding, respect, and interaction among diverse community populations; and

(7) documenting, in districts with ten or more American Indian students, how American Indian students are able to participate in program options uniquely relevant to American Indian students, including, for example, language and culture programs under Minnesota Statutes, section 124D.74, and how the students may participate in the district's voluntary integration efforts.

Subp. 7. Limits on participation in multidistrict collaboration councils. Notwithstanding subpart 2:

A. an isolated school district shall not be required to be part of two or more collaboration councils;

B. adjoining districts shall not be required to be part of two or more collaboration councils;

C. two adjoining racially isolated school districts shall not be required to participate together on the same collaboration council;

D. if a racially isolated district is a member of a joint powers board under subpart 4, its adjoining districts shall not be required to participate on the joint powers board; and

E. if an adjoining district is a racially isolated district exempted from subparts 2 to 8 under subpart 1, item B, the district shall not be required to be part of an interdistrict collaboration council and shall not be required to provide a plan of interdistrict integration efforts to the commissioner.

Subp. 8. Timeline for reports. Once a multidistrict collaboration plan has been filed with the commissioner, it does not need to be renewed for a period of four years from the date of filing.

3535.0180 EVALUATION OF COLLABORATIVE EFFORTS.

The commissioner shall biennially evaluate the results of collaborative efforts under part 3535.0170 to determine whether the collaboration plan was implemented and whether the action goals have been substantially met. After reviewing the results, the commissioner shall report to the house and senate education committees whether a district implemented its collaboration plan and substantially met its action goals. The commissioner may also make recommendations for appropriate legislative action.

EXAMPLES OF NEW INITIATIVES

MINNESOTA'S DESEGREGATION/INTEGRATION RULE

ANOKA-HENNEPIN PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1. Evergreen Park Elementary	For K-5: 8.29%	**40.89%**	32%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	**Representative Activities**
1. Provide necessary support for families in need.	1. New ESL Center-Oxbow Creek Elementary School. Laptops and video technology for Evergreen Park Elementary students.
2. Improve overall student achievement.	2. Relocation of Evergreen Park Kindergarten Classes. Full-day Kindergarten Program.
3. Increase multicultural learning opportunities for all students.	3. Revolution Youth Performance Group: Grades 9-12.

CONTACT PERSON

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Notes:

BLOOMINGTON PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1) **Valley View Elementary** 2) **Valley View Jr. High** (Formerly, Bravo Jr.)	**For K-5:** 24.88% **For 7-8:** 20.52%	1) **54.56%** 2) **47.43%**	29.68% 26.91%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	Representative Activities
1. Increase staff diversity.	1. Expand hours of Amer. Indian and Asian education advocates; Add Hispanic/Latino and African-American as determined by need.
2. Increase knowledge and understanding of people with diverse backgrounds.	2. Develop and implement comprehensive staff development program for all employees who interact with students and families. Develop and administrate a cultural awareness inventory for all learners; create activities based on the result of the cultural awareness inventory.
3. Develop the district's multi-cultural curriculum.	3. Develop a multicultural fine arts summer experience (August 2001, 2 wks/500 students, artists in residence from all ethnic genres). Define a process for identifying authentic multicultural materials to add to media centers (Grouped materials and identified sources, 5 day training for all media directors, infused training and media organization into schools).

4. Foster more contact between students of different races.	4. Develop and implement extended day opportunities.
5. Increase parent involvement; particularly in families who may not have been as involved in district activities previously.	5. Parent mini-grants. Examples: international kindergarten night, family fun day, Parent quilt project, homework involvement project.
6. Provide more language/communication support for families.	6. Hire staff to translate documents and provide in-person translation services.
7. All learners will achieve at or above state and district standards.	7. Explore kindergarten options that would help increase equal opportunity, such as full-day kindergarten and/or enhanced childcare services.

CONTACT PERSON

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Notes:

DULUTH PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1) Grant Magnet Elementary	**For K-6:** 12.88%	**37.77%**	24.89%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	Representative Activities
1. To obtain representation from the DIAC on District's curriculum committees with regard to multi-cultural curriculum.	1. Monitor appointments on the curriculum development committees. Include a DIAC representative on the District system Accountability Committee. Place a DIAC member on each Desegregation school site team.
2. To promote recruitment, hiring and retention of staff that can serve as role models for protected students through the development and implementation of the Comprehensive Desegregation/Integration Plan.	2. Create and maintain scholarship fund for college tuition stipends. Select and train community members of color to act in the screening and hiring committees of Human Resources.
3. To identify and address the ongoing social and economic needs of student within Desegregation schools through early intervention and assistance.	3. Provide specialized staff to assist students and their families attending desegregation schools. Act as a referral service for students and families requiring economic and social assistance from external agencies. Develop a collaborative relationship with housing authorities within central corridor of the city (Hope VI Plan).
4. To work toward closing the learning gap by optimizing the learning environment.	4. Hire specialized staff to work primarily with students who require additional academic support. Provide ancillary specialist staff in areas of science, music,

DULUTH PUBLIC SCHOOLS

	language, etc. Develop and deliver culturally specific curriculum to the three magnet schools via the culturally specific resource centers. Provide opportunities for interracial contact through programs such as summer school possibilities, extra-curricular programs and special cultural events.
5. To increase participation of all parents, especially parents of color and low income parents, in district related issues, activities and events.	5. Develop a parent partnership program to train parents of color and low-income parents on district-related issues, activities, and events. Maintain the education assistants that enable parents to formally participate in the educational process of their children at the three magnet schools. Ensure participation from a wide range of parents on the Desegregation school site teams.

CONTACT PERSON

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Notes:

MINNEAPOLIS PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1) McKnight EEC	**For K:** 72.72%	**1) 95%**	1) 22.28%
2) Anderson Elementary	**For K-6:** 74.12%	**2) 96.80%**	2) 22.69%
3) Benjamin Banneker Elem.	**For PK-8:** 73.89%	**3) 97.45%**	3) 23.56%
4) Bethune Elem.	**For PK-5:** 74.02%	**4) 97.24%**	4) 23.23%
5) Broadway Elem.	**For PK-8:** 73.89%	**5) 97.91%**	5) 24.02%
6) Hall Elem.	**For K-6:** 74.12%	**6) 97.09%**	6) 22.97%
7) Lincoln Elem.	**For K-7:** 74.14%	**7) 98.25%**	7) 24.08%
8) Martin Luther King Elem.	**For K-3:** 73.88%	**8) 96.97%**	8) 23.09%
9) North Star Elem.	**For K-5:** 74.06%	**9) 96.80%**	9) 22.74%
10) Powderhorn Elem.	**For K-7:** 74.14%	**10) 96.60%**	10) 22.42%
11) West Central Academy	**For K-8:** 73.91%	**11) 97.29%**	11) 23.38%
12) Whittier Park Elem.	**For K-5:** 74.06%	**12) 94.32%**	12) 20.26%
13) Willard Elem.	**For K-6:** 74.12%	**13) 95.81%**	13) 21.69%
14) North Senior	**For 9-12:** 68.03%	**14) 90.30%**	14) 22.28%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	Representative Activities
1. Accelerate academic achievement for all students.	1. Welcome Centers in Area Offices and Community Sites. School Choice.
2. Develop mutual trust and involvement with students, families and the communities.	2. School choice marketing and school district communications; such as annual publications, monthly publications, Insight Village and Policy Forum, public services announcements, media releases, school newsletters, church mailings, advertising, posters/postcards, school bus stop postcards.

3. Increase accountability for student success.	3. Measuring Up: A Report on the MPS 2000; School Report to the Community; Report on Achievement, Curriculum and Instruction.

CONTACT PERSON

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Notes:

OSSEO PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
Crest View Elementary	For K-6: 26.61%	**56.20%**	29.59%
Fair Oaks Elementary		**61.70%**	35.09%
Orchard Lane Elementary		**69.79%**	43.18%
Park Brook Elementary		**56%**	29.39%
Willow Lane Elementary		**54.05%**	27.44%
Zanewood Elementary		**71.72%**	45.10%
North View Junior High	For 7-9: 22.76%	**49.62%**	26.86%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	Representative Activities
1. Implement diversity oversight, facilitation, problem solving and enrichment services that insure all district buildings will be welcoming and supporting of all students and families in our district.	1. Establish a Cultural Liaison position in each building. Provide training for staff on diversity issues and interactions with parents of color. Provide information in multiple languages and formats, such as video, at community sites.
2. Create opportunities for students and families across the district to come together for academic, extra-curricular, fine arts, diversity and team-building experiences.	2. Develop K-12 drama, fine arts and language classes. Create a District 270 Multi-Cultural Fair.
3. Impact policies that support integrated schools and neighborhoods.	3. Provide families with clear guidelines on open enrollment requests.

	Make open enrollment a realistic option within the district by encouraging exploration and by providing transportation. Implement a magnet school with an emphasis on language and fine arts.
4. Narrow the student achievement gap among diverse groups.	4. Offer adult tutoring outside the school day with transportation. Provide mental health services to support learning and family issues and use the diverse community to provide supportive advocacy and social work services. Provide staff development for teachers and paraprofessionals on learning styles and alternative instructional delivery. Develop a Saturday School Program for enrichment, remediation, and as an alternative to suspension.
5. Recruit and retain teachers of color.	5. Develop partnerships with higher education to recruit, train and support teacher candidates and active teachers of color. Replicate the CUE program operating in Mpls. and St. Paul. Identify high school students of color who are interested in teaching careers and provide them with workshops, stipends, school experiences, and support.

CONTACT PERSON(S)

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Jeffery Westbrook, Cultural Programs Coordinator, Phone: (763) 391-7248

Notes:

ROBBINSDALE PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1) **Meadow Lake Elementary**	For K-5: 27.68%	**53.92%**	26.25%
2) **Northport Elementary**		**55.23%**	27.55%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	Representative Activities
1. By 2005, enrollment in all Robbinsdale Area Schools will be in compliance with the requirements of the Minnesota's Permanent Rules Relating to Desegregation.	1. • Inform Mpls. families who receive free or reduced price lunch of the enrollment and transportation opportunities available in Robbinsdale Area Schools. • Strengthen open enrollment in the Robbinsdale district and provide transportation to students who receive free or reduced price lunch, on a case-by-case basis. • Implement the Schoolwide Enrichment Model at Meadow Lake to attract students not protected in the Desegregation Rule. • Develop implementation activities and timeline for the selected magnet focus (Extended Day School) at Northport Elementary. • Design a communication work plan to inform internal and external audiences of the district's desegregation activities.
2. By 2005, Robbinsdale Area Schools will provide district	2.

students with learning environment designed to teach the academic and social skills needed to live in a pluralistic society.	• Train staff to receive protected class students to ensure that students and families are fully welcomed and instructionally integrated into the school. • Provide incentives to buildings that attract protected class students. • Implement appropriate extended-day and summer activities. • Assign reading and math specialists at the middle school level to assist students' basic skills achievement. • Continue to strengthen the Accelerated Schools Projects at Meadow Lake and Northport Elementary schools as a vehicle of optimizing academic opportunities for all students. • Design a communication work plan to inform internal and external audiences of the district's work.

CONTACT PERSON

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Notes:

ROCHESTER PUBLIC SCHOOLS

DEMOGRAPHICS

Racially Isolated Schools:	District Averages:	% Protected Class Students at Isolated Schools:	Difference from District Average:
1) **Hawthorne Elementary**	**For K-5:** 20.48%	**45.21%**	24.74%
2) **Holmes Elementary**	**For 1-5:** 20.28%	**48.78%**	28.50%
3) **Longfellow Elementary**	**For K-5:** 20.48%	**50.22%**	29.75%

INTERGRATION GOALS AND ACTIVITIES

Integration Goals:	**Representative Activities**
1. Develop collaborative efforts with city and county government.	1.Human Rights Coordinator. Prejudice reduction workshops for students. City planning-demographics/projected enrollment.
2. Hire a more diverse staff.	
3. Provide district choice programs.	3. Seven sites are offered as school choice options.

CONTACT PERSON

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Notes:

THE EVOLUTION OF TEACHING EDUCATION LAW: CHANGES AND TRENDS IN METHODOLOGY

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

THE EVOLUTION OF TEACHING EDUCATION LAW: CHANGES AND TRENDS IN METHODOLOGY

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2001: A Legal Odyssey

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The Evolution of Teaching Education Law: Changes and Trends in Methodology

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Introduction

An important part of the journey exemplified by the theme for the Education Law Association Conference, "2001: A Legal Odyssey", can be represented by the methodological trek of education law professors whose daily work has been changed significantly by the impact of technology on how they plan for and teach their courses. Many of them are now offering instruction through the use of distance learning and on-line course materials, giving exams on-line and utilizing many types of types of technology that have forever changed ways in which they provide instruction and students learn,

In response to the growing use of technology in all types of university law classes, including those in education law, a non-profit consortium of law schools that researches and develops computer-mediated legal instruction and supports institutions and individuals using technology in legal education, the Center for Computer-Assisted Legal Instruction (CALI), has been created. Because of the growing use of technology in the field of law, education law, an annual conference is now being held by CALI to provide educational training and support for law professors who wish to develop or enhance their technological skills in course design and delivery. This conference, held in the last week of June every year since 1995, allows law school computer professionals, law librarians, and law professors to share their experiences, attend sessions and discussion groups, and meet their counterparts across the country to exchange ideas and problem solve together. Because of this conference, new networks have been developed to open up a wealth of information about using technological methods and equipment to teach legal concepts (http://www.cali.org).

Purpose of the Study

In recognition of the changes in instructional design that professors and instructors have made in their delivery systems during the past two decades, the purpose of this research study was to determine changes and trends in methodology used by professors of education law and the degree of impact of technology on the way in which education law students are taught. The secondary purpose for this research study was used to determine the perceptions of school law professors regarding the effectiveness of the use of high-tech tools on their students' ability to synthesize and conceptualize legal concepts with reduced or altered time for face-to-face contact with their professors.

Methodology

The population used for this study was identified by the researchers who used the a directory of educational administration professors at universities and colleges in the United States to determine the names and contact information for all professors and instructors who were listed as teachers of educational law. After researchers compiled a mailing list of faculty in the directory who were listed as teachers of school law, a letter was sent to each person on the list asking them to participate in the study. In the letter, participants were directed to log on a website created specifically to provide access to a survey instrument that would allow them to respond directly to researchers' questions on this site.

Basic demographic information requested from respondents on this on-line survey included the type(s) of degrees held by the respondents, their university ranks, and the names of their universities. They were also asked for the number of years they had taught education law, the average number of students in their school law classes, and the average number of male and female students in their classes. Questions regarding classroom instruction on the survey website also included the number of school law classes taught by the respondents in which all of the students were in one classroom as well as the number of school law classes taught in which the instructor used distance education technology to teach students at more than one site through either compressed video or through satellite delivery. Other items asked of the respondents included the number of law classes that each instructor taught per year using only web-based instruction (with all materials and instruction provided via computer services with no face-to-face interaction) and the number of classes taught using "traditional" presentation methodology with all course materials and assessments for the course accessible on-line.

Respondents were also asked to note the frequency with which they used various types of technological equipment during their classroom presentations. Choices for the members of the sample included the following: overhead projectors, PowerPoint, HyperStudio, video, Elmo, email, and the Internet. An open-ended response space on the website also allowed members of the sample to add other types of technological equipment used in their education law classrooms.

The next website category of questions included those related to the frequency of types of instructional strategies that respondents used most often in their classroom presentations. Options given on this category included the following: lecture, role-play, scenarios, visualized lecture, PowerPoint, videotapes, simulations, and study groups. As in other response categories, an open-ended response space was available to allow respondents to add other instructional strategies that were not on the choice list.

In the next section of the on-line questionnaire, school law professors and instructors were asked to choose four of the most important goals for their school law classes. In addition to a "write-in" space for respondents to type in goals had that were not listed online, the options given for this category were:

- Trace the judicial decisions through the court system.
- Identify social patterns that emerge from case law.
- Analyze holdings of state and federal courts.
- Apply legal principles to school settings.
- Write a research paper on educational law.
- Maintain currency with emerging case law.
- Explain the impact of landmark cases.
- Demonstrate an increased awareness of legal and ethical responsibilities.
- Write legal briefs on significant legal cases.

The last category of the on-line survey regarding education law was represented by eleven items that were to be rated by the respondents using a Likert Scale to determine their agreement and disagreement with the following items.

- My teaching methodologies in education law classes have changed significantly because of technological advances.
- My education law course materials can be completely accessed on-line.
- The education law class that I teach is primarily on-line.
- My tests and assessment instruments are available primarily on-line.
- My quantitative tests are primarily scored and averaged electronically.
- My primary communication with education law students between classes is through email.
- Students in my education law classes work frequently in email or chat room study groups outside of class.
- I teach most of my educational law classes primarily to several sites through distance education.
- My personal (face-to-face) contact with students has been significantly reduced with my increasing use of technology.
- My students' ability to synthesize and conceptualize educational law concepts has been greatly enhanced because of the use of technology available through my course.

Results

Final results for this research study are currently being tabulated for the Education Law Association conference presentation, and the researchers will present the significant findings regarding the evolution of the teaching of education law as a result of technological advancements in their ELA conference session. Handouts that reveal the final results of the study will be available to session attendees and others who wish to receive the results.

(In order to have a handout of the results of this study sent to you, please email Carole Funk or Brenda Kallio at the addresses given below.)

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Investigation Without Litigation

(aka "Walking through the minefield of employee investigations without the benefit of loud noises.")

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Cases Relating to Adequacy of Workplace Investigations and Procedures

Public schools may face legal liability for wrongly disciplining an employee as a result of false allegations or for failing to appropriately discipline an employee in the event that misconduct has occurred. Therefore, complaints regarding teacher or school employee misconduct must be thoroughly and properly investigated to determine appropriate disciplinary action. Appropriate investigations are a critical part of the school's disciplinary process.

Despite this fact, there are few judicial decisions that address the adequacy of employee investigations. Nevertheless, a review of judicial decisions from various states provides a useful starting point for discussion and for developing general investigative guidelines. This memorandum examines some interesting cases wherein the courts have commented about the appropriateness of certain investigations or aspects of those investigations. Although by no means an exhaustive list of authority, these cases should prove useful in initiating a discussion regarding appropriate investigative policies and how to conduct effective investigations. In addition to these general principles, state statutes and regulations often mandate specific procedures for investigations of school employees.

Due Process Rights

The seminal case establishing the right of a public employee to a hearing before termination is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The United States Supreme Court held that if a public employee has a property interest in his or her position, the employee is entitled to a pre-termination hearing to satisfy the basic requirements of the due process clause.

While such a pre-termination hearing does not necessarily have to be formal or elaborate, the hearing must provide the employee with (1) proper notice of the charges and (2) an opportunity to respond. The pre-termination hearing is designed as an initial check against mistaken decisions and a method to determine whether there are reasonable grounds to support the employer's actions. The Court looked to the requisite post-termination hearing to provide more fully the employee with an opportunity to be heard, to be represented by counsel, to examine and cross-examine witnesses, etc.

Courts since *Loudermill* have confronted the issue of what type of hearing is necessary when the employee is not terminated but is suspended with or without pay. The majority of courts have found that no constitutionally protected property interest is implicated if a public employee continues to receive full pay and benefits during the time of his or her suspension (*See, e.g.*, *Harris v. Board of Education*, 105 F.3d 591, 596 (11th Cir. 1997) "[A] public official has a constitutionally protected property interest only in the economic benefits of his position . . . ."); (*Royster v. Board of Trustees*, 774 F.2d 618 (4th Cir. 1985) holding that no deprivation of property interest occurs so long as the employee receives payment of full compensation). A deprivation of a property interest is clearly implicated when a public employee is suspended without pay. The question is what type of due process is required when the discipline is short of termination.

Notice to Employee and Chance to Respond

Courts have generally declined to identify investigative procedures that should be conducted in all cases involving alleged employee misconduct. What constitutes an adequate investigation depends upon the unique circumstances of each case. However, a fair investigation should include prompt notice to an accused employee and an opportunity for the employee to respond. *See* Margaret J. Grover and Lauren S. Antonio, *Workplace Investigations: A Practical Approach*, 30 Brief 8, 11 (Fall 2000). In one of the few cases discussing the adequacy of investigations, the California Supreme Court indicated that an appropriate investigation of employee misconduct should result in "[a] reasoned conclusion . . . supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." *See Cotran v. Rollins Hudig Hall International*, 948 P.2d 412, 17 Cal.4th 93, 108 (Cal. 1998). The Court recognized that "it would be imprudent to specify in detail the essentials of an adequate investigation." *Id.* Instead, it recommended case-by-case adjudication, but cited the following passage from English common law with regard to identifying "investigative fairness":

> [the board] must act in good faith and fairly listen to both sides, for that is the duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Id. (citing *In Board of Education v. Rice*, (1911) App. Cas. 179, 182). Investigative policies should be formulated with this general principle in mind. Such policies should be flexible enough to allow for adjustments in investigative techniques, depending upon the circumstances in each case. In all cases, the accused employee should be notified and given an opportunity to respond.

Trained, Objective Investigators

It seems obvious that all investigations should be conducted by qualified, impartial investigators. However, real-world restrictions may create situations where evaluators have personal knowledge and opinions about the teachers or other employees that they are assigned to investigate. For example, in *Iversen v. Wall Board of Education*, teacher Nancy Iversen alleged that performance evaluations conducted by the school principal were tainted by personal bias. 522 N.W.2d 188, 190 (S.D. 1994), *see also Glickstein v. Neshaminy School District*, 1999 U.S. Dist. LEXIS 727, 39-40 (E.D. Pa. 1999) (district employee appointed to receive sexual harassment complaints was good friend of harassing employee). Iversen taught English classes at Wall High School. Pursuant to district policy, the school principal, Gale Patterson, conducted teacher evaluations by observing teachers in the classroom at least once during the school year. In her objection to an unfavorable evaluation, Iversen claimed that Patterson's subjective opinions were unsubstantiated. She further alleged that her performance was being criticized so that Patterson's sister-in-law, a part-time teacher of home economics, could be given full-time status. *Id.* at 193-94. Although Patterson's evaluations were found to be valid, the allegations of bias might have been avoided had Patterson recused himself (if permissible) or had the district rule provided for a panel of investigators (as in *Roberts v. Houston Independent School District* discussed infra).

Prompt Investigation

Prompt investigations of employee misconduct are important for several reasons. For example, prompt investigation and remediation of sexually harassing behavior can, in some cases, constitute a defense for an employer in a sexual harassment lawsuit. *See generally* Deborah P. Kelly, *Defenses to Sexual Harassment Charges: Conducting Workplace Investigations and Establishing Affirmative Defenses*, SE65 ALI-ABA 811 (January 2000). To be considered "prompt," an investigation should be both initiated and completed as soon as reasonably possible. *See, e.g., Kendrick v. Country Club Hills Board of Education*, 1998 WL 440891 (N.D. Ill. 1998), *Fall v. Indiana University Bd. of Trustees*, 12 F.Supp.2d 870, 874 (N.D. Ind. 1998), *Giordano v. William Paterson College of New Jersey*, 804 F. Supp. 637 (D.N.J. 1992). There is no single test by which to determine whether an investigation is promptly conducted. The test is one of reasonableness under the circumstances. In *Kendrick*, an investigation initiated within days of the complaint was considered reasonable. 1998 WL at 10.

In *Giordano*, six weeks was deemed a reasonable duration for an investigation that included interviewing the parties and twenty-one other employees, reviewing the tape recording of a conversation between the parties and preparing a written report. 804 F. Supp. at 643.

Interview All Material Witnesses

Interviewing every potential witness may interfere with the duty to promptly investigate. However, it is imperative to interview all witnesses known to have material knowledge of the alleged misconduct. *See, e.g., Campbell v. Kansas State University*, 780 F. Supp. 755 (D. Kan. 1991). In *Campbell*, the Dean of the university failed to interview a key witness. Although the *Campbell* court found that the investigation was not inadequate overall, there are numerous cases holding that similar failures did render the investigation inadequate. *See* Deborah P. Kelly, *Defenses to Sexual Harassment Charges: Conducting Workplace Investigations and Establishing Affirmative Defenses*, SE65 ALI-ABA 811, 820 (January 2000) and cases cited therein. If all relevant witnesses had been investigate in *Campbell*, the result might have been one less issue for litigation.

Concurrent Criminal Investigations

In some cases, employee misconduct may be the subject of criminal investigation, as well as school disciplinary proceedings. In such cases, a school board generally has no obligation to postpone its disciplinary investigation or dismissal proceedings pending the outcome of a criminal investigation or trial. *See, e.g., Hankla v. Governing Board of Roseland School District*, 46 Cal.App.3d 644 (1975). Randolph Hankla was a school principal dismissed by the school district for alleged sexual misconduct involving a student. At the time of his dismissal, Hankla also faced criminal charges for the same alleged incident. Hankla contended that once criminal charges had been made, the school district was required to await the outcome of the criminal process before pursuing his dismissal. *Id.* at 649. The court disagreed, finding that the school district had the option to wait for resolution of the criminal matter or proceed with its own disciplinary investigation and proceedings. *Id.* at 653.

In another case, the court found that a school employee's invocation of his Fifth Amendment privilege against self-incrimination did not prohibit a school board from continuing its investigation and dismissal proceeding. *See, e.g., Chadwick v. Superior Court In and For County of Maricopa*, 908 P.2d 4, 184 Ariz. 190 (Ariz. Ct. App. 1995). Chadwick claimed that if the dismissal hearing were permitted to go forward, he would be forced to either sacrifice his employment (by invoking his Fifth Amendment right) or waive his Fifth Amendment right by contesting the charges at his dismissal hearing. The school board filed an affidavit in response to Chadwick's claim wherein it assured that Chadwick would not be punished or deemed insubordinate for refusing to answer questions during the investigation. Further, the board certified it would not use his silence as evidence of guilt. The Court of Appeals deemed these assurances sufficient. It concluded that since there was no automatic penalty for invocation of the Fifth Amendment privilege, there was no violation of Chadwick's Fifth Amendment right. The Board was permitted to continue with its disciplinary proceeding.

Refusal to Cooperate in Investigation Upon Advice of Attorney

In another Arizona case, a school teacher argued that her failure to cooperate in an investigation was justified because based upon advice of counsel. *See Fulton v. Dysart Unified School District*, 651 P.2d 369, 133 Ariz. 314 (Ct. App. 1982). After an incident in which Doris Fulton allegedly slapped a student, Fulton was directed to report to the school principal to discuss the matter. Prior to reporting, Fulton spoke with a classroom teacher representative who advised her to obtain a lawyer before talking about the matter. Fulton later met with the school principal, but refused to relay what had happened or explain the reason for her silence. *Id.* at 370. Fulton was then instructed to submit a written report of the incident the next morning. Fulton did not submit the report. Fulton was then directed to submit her report by the end of the day. She did not. Fulton discussed the matter with an attorney who directed her not to discuss it with the school's administration until he could meet with her. She followed his advice and, in doing so, failed to respond to several other requests to submit her written report of the incident. *Id.* at 371. The school board ultimately dismissed Fulton as a result of the incident and on charges of violating the district policy regarding corporal punishment, unprofessional conduct and insubordination in failing to respond to the administration's request for a statement concerning the incident. The court of appeals found that the Board had not abused its discretion in deciding to dismiss Fulton even though she had remained silent upon the advice of her counsel. *Id.* at 375.

Investigation of Employee's Personal Conduct

Investigation into a teacher's or other school employee's personal life may be appropriate, depending upon whether the school faces liability for the subject personal conduct. *See, e.g., Welch v. Board of Education of Chandler Unified School District*, 667 P.2d 746, 136 Ariz. 552 (Ct. App. 1983). Teacher Ronald Welch was dismissed for personal involvement with a student that he later married. During the course of the school district's investigation of the matter, Welch denied any personal involvement with the student. The school district expressly directed Welch not to maintain an improper social relationship with any students. Nevertheless, Welch married the student a few weeks after the school began its investigation. Welch was dismissed for insubordination for failing to cooperate in the school district's investigation and for violating its direct order. In his appeal from dismissal, Welch argued that the investigation had been into his personal life and was not related to his conduct or suitability as a teacher. *Id.* at 554-55. He claimed that his conduct could not be considered insubordinate and his dismissal was unreasonable. The court disagreed with Welch's claims, stating that '[w]hile the questions asked Mr. Welch related to his personal life, they also related to his role as teacher." *Id.* at 556. Because it could be liable for such conduct by Welch, the school had a legitimate interest in determining whether Welch was personally involved with a student. *Id.*

Searches of Public Employee Workspaces

In some cases of alleged misconduct, a search of certain workspaces might be useful to the investigation. Whether or not such searches are permissible depends upon the specific circumstances of the case. Although it did not involve discipline of a school teacher, *Ortega v. O'Connor* provide guidance with respect to investigative searches involving school employees. *See O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L.Ed.2d 714, 179 (1987), *see also* William D. Valente, *Searches of Teachers Offices, Desks and Files in Public Schools*, 39 Ed. Law Rep. 931 (1987), *Gillard v. Schimidt*, 579 F.2d 825, 827-28 (3d Cir.1978) (holding that school employee had legitimate expectation of privacy in his workplace desk, which school board member had searched for evidence that the employee had drawn an anonymous newspaper cartoon ridiculing the school board). In *O'Connor*, a plurality of the United States Supreme Court held a government employee had a legitimate Fourth Amendment expectation of privacy in his office desk and file cabinets. However, the reasonableness of such expectation is subject on a case-by-case basis to specific workplace practices and procedures. Dr. Ortega was the chief of professional education at a state hospital where he supervised psychiatric training programs for resident physicians. While Dr. Ortega was on an administrative leave, the hospital had conducted an investigation, which included a search of Dr. Ortega's office, desk and files without Dr. Ortega's consent and without a warrant.

The plurality found that while government employees did have a legitimate expectation of privacy, the "operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when the intrusion is by a supervisor rather than a law enforcement official." *Id.* at 717. The reasonableness of public employees' expectation of workplace privacy must be analyzed on a "case-by-case" basis, including an analysis of whether an expectation of privacy has been reduced by "actual office practices and procedures, or by legitimate regulation." *Id.* at 717-18.

Videotaping

A Texas Court of Appeals case addresses the use of videotaping as a means of recording and evaluating a teacher's performance. *See Roberts v. Houston Independent School District*, 788 S.W.2d 107 (Tex. App. 1990). In *Roberts*, a teacher appealed her proposed termination. In the course of its investigation, the school district had examined written performance evaluations and videotapes of her classroom performance. The videotapes had been made, over Roberts' objection, by an assessment team as an aid to understanding the team's observations and criticisms. In her appeal, one of Roberts' allegations was that the videotapes of her classroom performance violated her right to privacy. *Id.* at 110-11. The court disagreed, finding that teaching in a public classroom was not an activity about which an individual could possess a reasonable expectation of privacy. *Id.* Since videotaping was not prohibited by the school district's policies, their was no error in them being used in the evaluation of Roberts' performance. *Id.* It is important that the videotapes in this case were made with Roberts' knowledge, even though she objected to them at the time they were made.

Conclusion

The cases cited herein are only a sampler of those published involving the issues of workplace investigations. One of the overriding themes that can be derived from such cases is the principle that what constitutes an appropriate investigation depends upon the unique factual circumstances and conduct at issue. As a general principal, however, school administrations would be well served by responding seriously to all allegations of misconduct, appointing an individual or individuals to develop expertise in conducting investigations, and obtaining professional investigative or legal advice when appropriate. In addition, administrators should become familiar with any unique investigative guidelines or restrictions established by their local state's educational code.

Checklist for Disciplinary Letters

- ☐ Review the terms of the local agreement with the union or employees' representative, district policies, state and federal laws.
- ☐ Give notice of the action that you will take.
- ☐ Include the position & title of person you are disciplining.
- ☐ Note the effective date, and give enough notice as required by the contract or policy.
- ☐ If the disciplinary action is a demotion, include a job description of the new position.
- ☐ If the disciplinary action is a suspension, define the length of the suspension and effective dates.
- ☐ Cite the legal authority for the appropriateness of the discipline.
- ☐ Describe the specific causes of the disciplinary action, *e.g.*, neglect of duty, gross misconduct, etc.
- ☐ Include a detailed description of the incident(s) leading to the disciplinary action.
- ☐ Explain how the incident(s) relate to the charges.
- ☐ Schedule a pre-disciplinary meeting and specify attendees. Request any pertinent response from the employee if appropriate.
- ☐ Explain how the level of discipline was determined, including any prior offenses, position with higher accountability, the effect on others, the seriousness of the offense, etc. (Watch the dates of prior offenses to ensure they do not overlap.)
- ☐ If the disciplinary action is not a dismissal, include a notice that repeated misconduct may result in further disciplinary action.
- ☐ If the disciplinary action is an immediate dismissal, give the reasons to support the action.

☐ Inform the employee of his or her right to appeal the action.

☐ Inform the employee of his or her right to grieve if required by the collective bargaining agreement.

☐ Include the signature of the responsible official (include a copy for the personnel file, supervisor, union representative, etc.)

Investigation Without Litigation

a.k.a. “Walking through the minefield of employee investigations without the benefit of loud noises.”

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What Can Go Wrong:

- ✓ Civil Lawsuit for Damages
- ✓ Personal Lawsuit for Damages
- ✓ Contractual Grievance
- ✓ Disciplinary Action Overturned
- ✓ EEOC Claim
- ✓ Unfair Labor Practice Charge (ULP)
- ✓ Unemployment for an Administrator

"The Complaint"

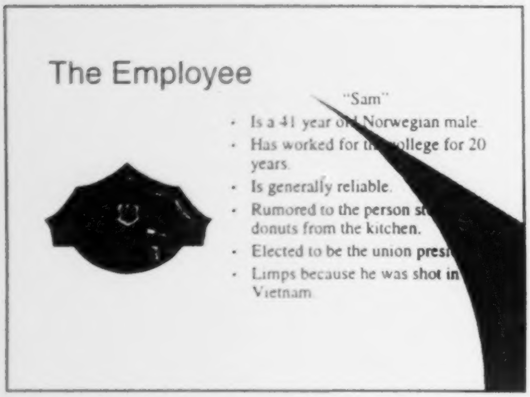
Two students were leaving the li ry late one night when they saw an elder security guard limping out the back of the school kitchen.

In one hand was a large soda pop and in th other he had what looked like a plate of food. They had heard rumors he often stole things, so the next day they reported him to a trustworthy administrator.

The Investigators

Administrator A ♀

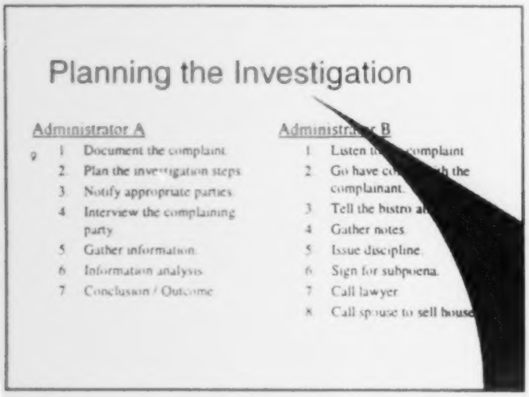
Admi strator B



The Employee

"Sam"

- Is a 41 year o Norwegian male.
- Has worked for th ollege for 20 years.
- Is generally reliable.
- Rumored to the person st donuts from the kitchen.
- Elected to be the union presi
- Limps because he was shot in Vietnam.



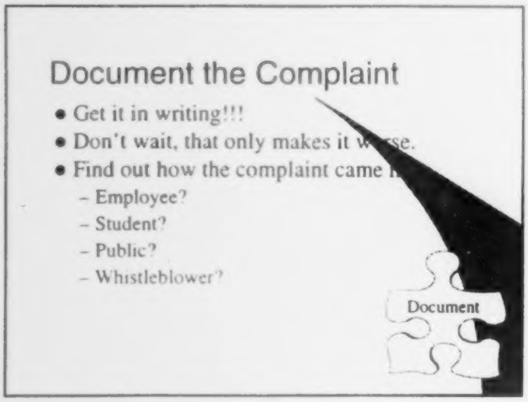
Planning the Investigation

Administrator A

1. Document the complaint.
2. Plan the investigation steps.
3. Notify appropriate parties.
4. Interview the complaining party.
5. Gather information.
6. Information analysis.
7. Conclusion / Outcome.

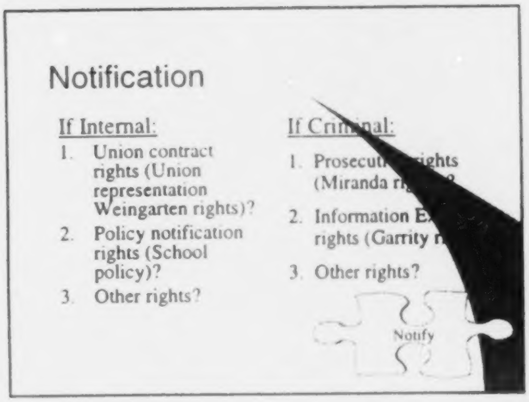
Administrat B

1. Listen t complaint
2. Go have co th the complainant.
3. Tell the bistro a
4. Gather notes.
5. Issue discipline.
6. Sign for subpoena.
7. Call lawyer.
8. Call spouse to sell house



Document the Complaint

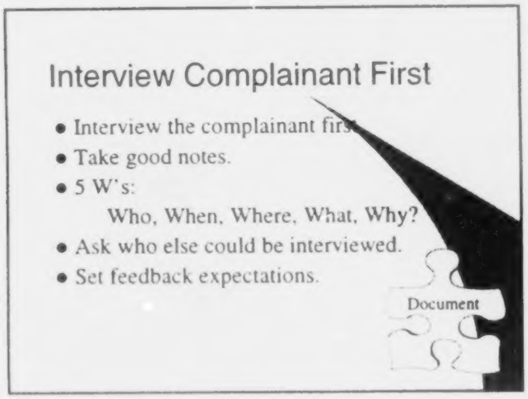
- Get it in writing!!!
- Don't wait, that only makes it w se.
- Find out how the complaint came i
  - Employee?
  - Student?
  - Public?
  - Whistleblower?



Notification

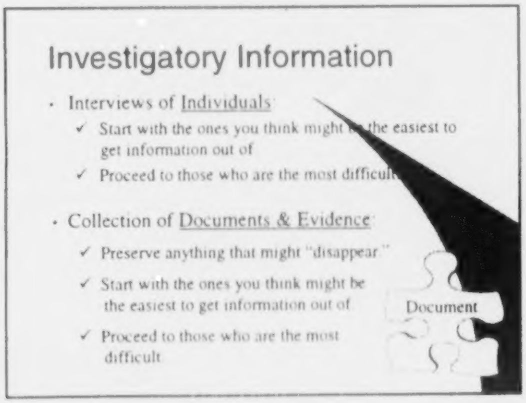
If Internal:
1. Union contract rights (Union representation Weingarten rights)?
2. Policy notification rights (School policy)?
3. Other rights?

If Crim nal:
1. Prosecut ights (Miranda ri ?
2. Information E rights (Garrity r
3. Other rights?



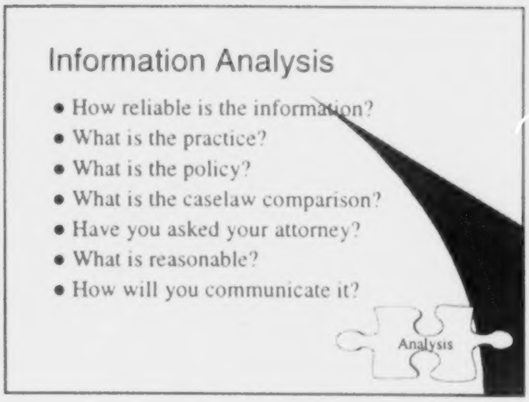
Interview Complainant First

- Interview the complainant firs
- Take good notes.
- 5 W's:
  Who, When, Where, What, Why?
- Ask who else could be interviewed.
- Set feedback expectations.



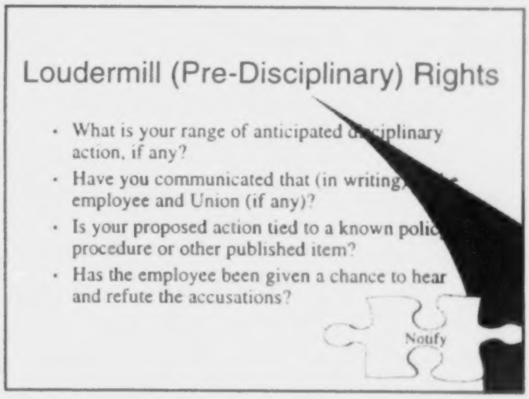
Investigatory Information

- Interviews of Individuals:
  - ✓ Start with the ones you think might the easiest to get information out of
  - ✓ Proceed to those who are the most difficul
- Collection of Documents & Evidence:
  - ✓ Preserve anything that might "disappear."
  - ✓ Start with the ones you think might be the easiest to get information out of
  - ✓ Proceed to those who are the most difficult



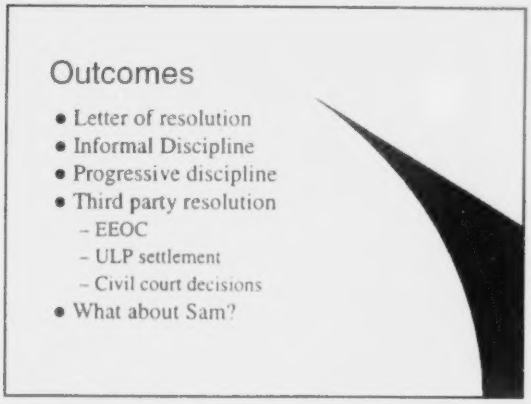
Information Analysis

- How reliable is the information?
- What is the practice?
- What is the policy?
- What is the caselaw comparison?
- Have you asked your attorney?
- What is reasonable?
- How will you communicate it?



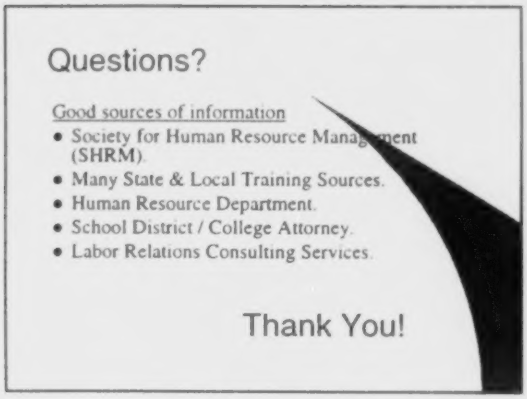
Loudermill (Pre-Disciplinary) Rights

- What is your range of anticipated disciplinary action, if any?
- Have you communicated that (in writing) employee and Union (if any)?
- Is your proposed action tied to a known polic procedure or other published item?
- Has the employee been given a chance to hear and refute the accusations?



Outcomes

- Letter of resolution
- Informal Discipline
- Progressive discipline
- Third party resolution
  - EEOC
  - ULP settlement
  - Civil court decisions
- What about Sam?



Questions?

Good sources of information

- Society for Human Resource Management (SHRM).
- Many State & Local Training Sources.
- Human Resource Department.
- School District / College Attorney.
- Labor Relations Consulting Services.

Thank You!

Policy Responses to Violence in Our Schools: An Exploration of Security as a Fundamental Value

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Schools have long been considered safe havens for students; a place of calm and a refuge in an often troubled and increasingly violent world. Murder and death may stalk the streets leading to the school but they did not enter the schoolhouse gate, or so we once thought. Parents typically believed that once their children arrived at school they would be in a safe environment. Many students now believe that their survival at school, once taken for granted, is an issue in doubt. The United States General Accounting Office in a 1995 report to Senator Christopher Dodd, a member of the Subcommittee on Children and Families, wrote: "The incidence of school violence--searches for weapons, shootings, gang activity, fighting, and other disruptive behavior--has risen to unacceptable levels".[1] "Research shows that school violence has become a serious concern for the American public."[2]

It can be argued that the concern about the safety of students in our schools reached a critical mass when the Nation was riveted and horrified by the April 20, 1999 television pictures of students at Columbine High School running out of their school in single file hands behind their heads herded by SWAT team members dressed in black. The vision of 17-year-old Patrick Ireland being dragged to safety through a broken second-floor school window by armed police officers[3] became a focal point of the horror of 12 students and one teacher murdered and the suicide of the two deeply troubled teens who authored the rampage. United States Senator Harry Reid (D-Nevada), following the killings in Littleton, Colorado, stated, "This is an emergency if anything has ever been an emergency."[4]

Policy makers have responded to the heightened concern about the need to protect our students by passing a variety of measures designed to make our schools safe once again. Police officers, metal detectors, ID cards, zero-tolerance, and random locker searches have become more the norm than the exception.

It is the thesis of this paper that the pervasiveness of the policy response to drugs, weapons, and violence has indicated the emergence of a new fundamental value in educational policy making--security. Public policy pursues those values the polis considers most important at a given time. The simplest most basic, human need is survival. Government must protect its citizens from recognized threats--crime and invasion. Schools have not, historically, pursued security as a fundamental value. The school's concern has been for student safety. Disciplinary policies are typically aimed at disruption, fighting, and rowdy behavior, whereas, security policies are aimed at protecting students from grievous injury and death. Discipline maintains the integrity of the instructional environment and provides order. Security maintains the health and well being of the individual. For the first time schools are pursuing policies of security.

Research

This is an exploratory study designed to elicit data on the perception of school superintendents regarding policies that reflect the value of security. The literature on educational policy formation will provide the theoretical base for the study. The study will focus on whether security is emerging as a separate fundamental value in educational policy making. Superintendents will be asked to make choices between various fundamental values, much as they currently do in any policy environment where resources are not abundant.

A random sample of public school superintendents (n= 300) from New England will be surveyed on district policies related to security. Demographics will be solicited on the size of the student population and whether the school district is located in a rural, suburban, or urban setting. The instrument asks 19 questions, most of which utilize a Likert Style format. Descriptive and inferential statistics will be used to analyze the data.

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[1] United States General Accounting Office. April 1995. School Safety: Promising Initiatives for Addressing School Violence. Washington, D.C.: GAO/HEHS-95-106, p. 1.

[2] Astor, R.A., Meyer, H.A., & Behre, W.J. 1999. Unowned Places and Times: Maps and Interviews About Violence in High Schools. American Educational Research Journal, 36(1): 3-42.

[3] Associate Press. 1999 Student grateful for window rescue. BOSTON GLOBE (May 8) A5.

[4] Preston, M.D. 1999. Democratic senators seek $996m to prevent school violence. BOSTON GLOBE (May 8) A5.

What's Right and What's Wrong with IDEA '97

A Panel Discussion with Educators and Attorneys
ELA Conference
Albuquerque NM
November 16, 2001

The Individuals with Disabilities Education Act (IDEA) is a work in progress, but the 1997 Amendments move the original Education of the Handicapped Act (EHA) much further toward a merger of special and general education than previous amendments to EHA and IDEA. The current Act envisions system change on a grand scale and improved postschool outcomes for children and youth with disabilities.

Our panel of public and higher educators will discuss a series of issues, among them:

1. What are the key changes in IDEA '97 with respect to IEPs, discipline, placement, parental involvement, accountability, etc.?

2. Are some changes and expectations more problematic than others?

3. What political problems have arisen in implementing IDEA '97 over the past four years?

4. Are schools able to effectively implement the programming changes?

5. How big a problem is the discipline of IDEA students?

5. How are courts responding to the 1997 amendments?

6. What are possible changes to IDEA in the future?

TECHNOLOGY AND THE INTERNET-ACADEMIC FREEDOM

Update on Legal Issues Surrounding Technology Use in K-12 Public Schools

Kathleen Conn
West Chester Area School District

The Internet and Academic Freedom: The Implications of *Urofsky v. Gilmore*

Luke M. Cornelius
State University of West Georgia

Alvin Schilling
University of Florida

EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

UPDATE ON LEGAL ISSUES SURROUNDING TECHNOLOGY USE IN K-12 PUBLIC SCHOOLS

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

REVISED September 19, 2001
Title of Presentation:

Update on Legal Issues Surrounding Technology Use in K-12 Public Schools

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Abstract:

The presentation will discuss new developments in the emerging statutory and case law pertaining to the use of technology in K-12 public school classrooms and libraries. Topics covered will include an overview of the spread of technology in public schools, the status of filtering legislation and considerations pertaining to its constitutionality, student web sites created inside/outside of school and the possible causes of action for defamation and negligent supervision by parents, family and student privacy issues, electronic harassment, and, finally, school districts' emerging technology responsibilities in the area of special education.

Outline:

I. Technology in K-12 Public Schools

   A. The Increase in Technology Access and Use in Public Schools
   B. Technology Integration, Curriculum and the Standards Movement

II. Congressional Attempts to "Protect" Students from the Internet and the Current Status of Legislation

   A. The Communications Decency Act (CDA), Pub. L. 104-104, Title V, Feb. 8, 1996
   B. The Child Pornography Prevention Act (CPPA), Pub. L. 104-208, Div. A, Title I, S 101 (a), Sept. 30, 1996
   C. The Children's Online Privacy Protection Act (COPPA), Pub. L. 105-277, Div. C, Title XIII, Oct. 2, 1998
   D. The Child Online Protection Act (COPA), Pub. L. 105-277, Div. C, Title XIV, Oct. 21, 1998

E. The Children's Internet Protection Act (CIPA), Pub. L. 106-554, Dec. 21, 2000.

III. Offensive Student Web Sites

A. Opinion or Defamation
    J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Cmwlth. 2000).
B. Threats or True Threats
    1. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).
    2. Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275 (Or. App. 2000).
    3. In re: Douglas D., 626 N.W.2d 725 (Wis. 2001).
C. New Developments: Students Providing Web Forums for Classmates

IV. The Rights of Parents to Control Children's Internet Access
    1. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).
    2. Kathleen R. v. City of Livermore, 104 Cal. Rptr.2d 772 (Cal. App. 2001).
    3. Cyberspace Communications, Inc. v. Engler, 142 F.Supp.2d 827 (E.D. Mich. 2001).

V. E-mail
    1. Rollins. v. Cardinal Stritch Univ., 626 N.W.2d 464 (Minn. App. 2001).
    2. Killion v. Franklin Regional Sch. Dist., 136 F.Supp.2d 446 (W.D. Pa. 2001).

VI. Implications of the Digital Millennium Copyright Act for Schools

VII. Special Education and Technology in K-12 Public Schools

Background References:

Conn, Kathleen, Karen Price and Perry Zirkel, *The Internet in Public Schools: What Are the Legal Issues?*, 81 PRINCIPAL 38 (September 2001).

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THE INTERNET AND ACADEMIC FREEDOM: THE IMPLICATIONS OF *UROFSKY V. GILMORE*

PART 1: IMPLICATIONS FOR ACADEMIC FREEDOM AND INSTITUTIONAL CONTROL

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ALBUQUERQUE NOVEMBER, 2001

Introduction:

The Fourth Circuit ruling in *Urofsky v. Gilmore*, recently declined for review by the Supreme Court, is one of the most important and controversial decisions affecting Higher Education and the First Amendment in recent years. This joint presentation will seek to address several of these issues. *Urofsky* may present the most fully developed caselaw yet on the application of academic freedom to the Internet in higher education. It would appear to soundly answer certain questions regarding the authority of college and university administrators to regulate the access of their professors and other employees to the Internet while using state funded facilities and computers. In addition, the *Urofsky* decision has questioned the application of academic freedom law as traditionally conceived. In its decision the Fourth Circuit has reinterpreted or rejected such precedents as *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*. By addressing academic freedom as an institutional right, as opposed to its traditional treatment as an individual right, the Fourth Circuit has called into question both precedents and traditional assumptions regarding the application of academic freedom. Finally, in the second part of this presentation, the question of standing, specifically of state university faculty, to challenge such statutory regulations of their employers and legislatures will be addressed.

Part 1: Implications for Academic Freedom and Institutional Control

The Fourth Circuit ruling in *Urofsky v. Gilmore*, 216 F.3d 401, 145 Ed.Law Rep. 582 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 759 (2001) has raised numerous issues related to the application of the First Amendment to the Internet in an academic setting and the concept of academic freedom in general.

Initially, the Circuit court overturned the ruling of the district court, *Urofsky v. Allen*, 995 F.Supp. 634 (E.D.Va. 1998), which had granted summary judgment to the plaintiffs, several state university professors. The professors had sought injunction against the Commonwealth of Virginia's new statute limiting their access to sexually explicit websites (Va.Code Ann. §§ 2.1-804 to -806). The professors argued that the restrictions impaired their academic freedom by limiting their ability to perform legitimate research. A panel of the Fourth Circuit, *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), reversed. The appellate court held, on appeal, that the speech at issue did not constitute a matter of public concern, as defined in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. (1994). Additionally, the court found the

Commonwealth to be well within its powers to limit its employees in their use of state provided equipment and facilities.

In its *en banc* review, the entire Fourth Circuit upheld the reversal of the trial court but for more extensive reasons. The court, explicitly rejecting commonly interpreted precedents such as *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203 (1957) and *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967), held that the First Amendment did not extend any special or additional protection to college faculty under the concept of "Academic Freedom." Going further than the issue of determining the protected nature of the speech and the state's interest in regulating its facilities, the full appellate court held that any legal concept of academic freedom, if one could be established, belonged to the institution as a whole, and not to any particular individual.

When combined with its previous ruling is *Boring v. Buncombe*, 136 F.3d 364 (4th Cir. 1998), the Fourth Circuit's decision in *Urofsky* raises serious questions regarding the future application of academic freedom law. The contention of the authors is that the circuit court has drawn an extremely narrow interpretation of First Amendment and academic freedom law that is not consistent with Supreme Court precedent and the interpretations of other circuits. Furthermore, not only have these recent Fourth Circuit decisions selectively applied precedents, but that the circuit court also erred in interpreting a right, established under the First Amendment, as an institutional right. The contention of the authors is that the Supreme Court established academic freedom as a "special concern" of the First Amendment in *Sweezy*. As such, any right derived from the First Amendment, or the Bill of Rights in general, represent a right held by individuals. This analysis places the final aspect of the Fourth Circuit's, regarding the institutional right of academic freedom, at odds with commonly accepted interpretations of both academic freedom caselaw and constitutional rights.

A separate issue, more fully raised by the initial Fourth Circuit panel in *Urofsky*, is the question of administrative control as regards the utilization of state owned and provided equipment and facilities. In this regard it can be concluded, on a much simpler basis, that the commonwealth's restrictions are reasonable and justified. By referring to decisions such as *McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979) and *Day v. Board of Regents of University of Nebraska*, 911 F.Supp. 1228 (D.Neb. 1995), it can be established that any doctrine of academic freedom does not supersede the right of public employers to restrict the use of their facilities and equipment by their employees. Although the appellate decision in *Urofsky* may be scrutinized and criticized for its controversial, and possibly unnecessary, interpretation of academic freedom caselaw, it remains a powerful precedent in upholding the right of academic institutions and other public agencies to regulate the utilization of their facilities. *Urofsky* establishes that educational institutions clearly have the authority to restrict the access of employees, or others, to both the Internet in general and to specific categories of websites and materials.

THE INTERNET AND ACADEMIC FREEDOM: THE IMPLICATIONS OF *UROFSKY V. GILMORE*

PART 2: STANDING AS A CONSTITUTIONAL CONCERN: A REQUIRED THRESHOLD ISSUE

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I. Introduction.

The practice of courts inquiring into, or defendants raising the issue of, a plaintiff's standing has increased over the past thirty years. This is not surprising considering that standing has been determined to be a constitutionally required, albeit procedural, issue in all cases in controversy under Article III of the Constitution. If a court fails to make the inquiry under its own direction, the defendant had better raise the issue or it could damage his case and be lost on appeal. Failure to raise the issue of standing could subject a defendant to an unfavorable decision based upon substantive issues, when he possibly need not have had to contend with the same.

Two almost identical "Internet-academic freedom" cases, *Urofsky v. Gilmore* (216 F.3d 401) and *Loving v. Boren* (133 F.3d 771), provide an interesting contrast that demonstrates this point. Other cases, such as *ACLU v. Johnson* (194 F.3d 1149) and *Mainstream Loudon v. Board of Trustees* (24 F. Supp.2d 552), which also take up issues concerning use of the Internet but not academic freedom, and *Lujan v. Defenders of Wildlife* (504 U.S. 555) and *Dorsett v. Board of Trustees* (940 F.2d 121) provide additional insight into this contrast.

In *Urofsky*, although the plaintiffs lost their suit as a result of the court's peculiar interpretation of the First Amendment, a substantive law issue, their action should have been dismissed on the procedural issue of standing. In *Loving*, the case never reached the level of consideration on its merits and the application of substantive law, to-wit: interpretation of the First Amendment, since it was dismissed on the procedural issue of standing. Due to the fact that *Urofsky* and *Loving* presented almost identical factual situations with very similar alleged injuries claimed by the plaintiffs, potential litigants, like academics in higher education and their lawyers, should wonder why these two cases were decided on such different grounds.

The research question presented herein is, did the Fourth Circuit, in *Urofsky*, err in failing to inquire into the matter of plaintiffs' standing?" The answer is yes. The Fourth Circuit failed to inquire into the issue of standing, in particular its requirement of injury in fact, even though both the district court and the court of appeals discussed injury as it applied to substantive constitutional issues. In this failing, the Fourth Circuit also violated the rule of strict necessity and ignored the issue of mootness. The purpose of this discussion is to inform the education community and the legal profession about the great significance that the issue of standing can have in litigation. The matter is important to both potential defendants and plaintiffs.

II. Background: Standing to Raise Constitutional Questions; Avoidance of Unnecessary Decisions

A. Standing

U.S. v. Raines,

362 U.S. 17 (1960). The Court emphasized that its standing requirements were not principles ordained by the Constitution, but rather rules of practice, and accordingly, exceptions will always be proper where there are weighty countervailing policies.

Allen v. Wright,

468 U.S. 737 (1984). The Court pronounced a dramatic shift in its understanding of the issue of standing. Justice O'Connor was able to separate judicially self-imposed limits on the exercise of federal jurisdiction from a core component (standing) derived directly from the Constitution. The core component of the standing doctrine, as described by Justice O'Connor, focuses upon whether the plaintiffs have alleged a "distinct and palpable" personal injury [injury in fact], which … the courts are capable of redressing.

Data Processing v. Camp,

397 U.S. 150 (1970). The Court altered previous law by abandoning the legal interest test in favor of a new inquiry into whether there was injury in fact

Sierra Club v. Morton,

405 U.S. 727 (1972). The Court denied standing, stating that the fact that an aesthetic, conservational, or recreational harm would be sufficient harm (e.g. a violation of federal law) did not mean that the Court would abandon the requirement that the party seeking review must have himself suffered an injury. The Sierra Club was found to have failed to allege that it or its members used the site in question.

B. Avoidance of Unnecessary Decisions/The Rule of Strict Necessity

Wood v. Goodson,

485 S.W.2d 213 (Ark. 1972). It is firmly established that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit

Wood v. Georgia,

450 U.S. 261 (1981). Courts, therefore, should not inquire into the constitutionality of an act until a concrete case arises in which a decision of such a question is unavoidable for the determination of the case itself. In other words, there is no other issue, either procedural or substantive, that can be determined that would dispose of the case.

Correa v. Clayton,

563 F.2d 396 (9th Cir. 1977). To avoid a determination of a constitutional issue, a court may rely on a non-constitutional ground even if such ground was neither raised by a litigant nor considered by a lower court. Accordingly, a court must also be able to rely on a constitutional procedural ground, such as standing.

III. Urofsky v. Gilmore and the Issue of Standing.

A. The Challenged Act

Va. Code Ann. Sections 2.1-804 to 806 (effective July 1996) provided in part: Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads.... The Act did not include criminal or civil penalties for violation of its provisions.

B. The Courts' Holdings

In ruling in favor of the plaintiffs, six professors at Virginia state colleges and universities, the district court said that because the Act's restrictions effectively discouraged discussion on sexual topics, they violated state employees' First Amendment right to freedom of speech. It added that the process for seeking exemptions had proven problematic. Therefore, it did not provide a workable remedy for plaintiffs' alleged injury. The Fourth Circuit reversed the district court's decision, ruling that the Act's provisions were consistent with the First Amendment under the *Pickering* test and the *Connick* rule. It should be noted that both courts discussed "injury" as it applied to establishing a violation of a constitutional right. But neither court chose to discuss "injury" as it applies to the issue of standing.

C. The Error of the Courts

Even though the core component of standing, injury in fact, is a constitutional factor rather than a mere prudential one and, as such, must be considered as a threshold issue, the courts ignored the same and proceeded directly to consider plaintiffs' complaints of violations of their freedom of speech and academic freedom. It can be said that the courts ignored rather than simply overlooked the issue of standing because both dealt with the issue of injury.

D. The Non-presence of Injury in Fact

i. The Act provided no criminal or civil penalties for violation of its provisions.

ii. The "permission process", contrary to the district court's opinion of the same, provided a viable remedy to any alleged injuries claimed by the plaintiffs. Especially considering that the plaintiffs never applied for permission, they should have been estopped under the standing doctrine from pursuing their claims.

E. Loving v. Boren: The Primary Contrast Case to Urofsky v. Gilmore.

A. The Challenged Administrative Action

The University of Oklahoma provided computer access and Internet services to students, faculty, and staff. In fear that the university was allowing offensive material to be carried on its Internet server through interactive news groups, it ordered a number of news groups blocked on the server. Later, the university implemented a new policy, creating two separate news servers, A and B. The A server allowed access to only the news groups approved by the university. The B server allowed access to all news groups, but had the following restriction: anyone who wishes to access news groups on the B server must be over eighteen years old, and must agree to use the server for academic and research purposes. A professor at the university brought suit against the university alleging that in blocking access to certain news groups, the university violated his First Amendment right to free speech.

B. The Courts' Holdings

The district court ruled in favor of the university. It stated that the university's computers and Internet services do not constitute a public forum and the state has the right to restrict use of its facilities to the use for wnich they were intended. This was a decision based on substantive constitutional issues. On appeal, the Tenth Circuit affirmed the district court's ruling on procedural grounds. It held that the plaintiffs lacked standing, in that he had failed to show that he had suffered an injury in fact, to-wit: no evidence was presented that he had been denied access to any news groups. As a result, the court was able to efficiently dispose of the case without unnecessarily deciding any substantive constitutional issue.

V. The Urofsky Courts Should Have Considered Other Recent or Intra-jurisdictional Standing Cases.

A. Recent Cases That Denied Standing

Lujan v. Defenders of Wildlife,

504 U.S. 555 (1992). The Court, relying on the reasoning found in *Sierra Club*, found that environmental groups failed to show that one or more members would be directly affected by a federal agency rule, apart from the members' special interest in the subject. Therefore, they could not demonstrate that they suffered and injury in fact and hence lacked standing to seek judicial review of the rule. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, said the Court, for they do not demonstrate an imminent injury.

Dorsett v. Board of Trustees,

940 F.2d 121 (5th Cir. 1991). Plaintiff claimed that the defendants had retaliated against him because he challenged several departmental decisions and because he publicly supported another professor who had been attacked by the administration for refusing to lower academic standards. He alleged that various administration decisions harmed his reputation, that he had been unfairly denied summer employment and salary increases, and that he had suffered other miscellaneous harassments. In ruling for the defendants, the Fifth Circuit found that the plaintiff had not been fired or even threatened with termination. In fact, he still was teaching at the university. His alleged injuries were, therefore, considered trivial matters under the mootness doctrine. Although not a standing case, per se, this case is typical of some cases that should have been considered by the Fourth Circuit in *Urofsky*. *Dorsett* provides a good example of the great scrutiny courts will administer in determining whether or not sufficient actual and substantial injury is alleged and proven by a plaintiff in order to establish a violation of a constitutionally protected right, just as the courts in *Urofsky* had done. This scrutiny is analogous to that applied by courts

when the issue of standing is considered. It can be well argued that the same scrutiny should be first applied to the matter of standing since it is a mandatory threshold issue, whereas an injury caused by an alleged violation of a constitutionally protected right is not.

Dorsett is particularly relevant to *Urofsky* as it relates to alleged injuries.

B. Recent Cases That Found Standing

Mainstream Loudon v. Board of Trustees,

24 F. Supp.2d 552 (E.D. Va. 1998). Defendant library board asserted that none of the intervenors had standing to sue now because their sites were no longer blocked under it's challenged "Policy on Internet Sexual Harassment." Defendant had previously admitted that these sites did not violate the Policy [an actual injury in fact]. In response, intervenors alleged that they had standing to sue if there is a legitimate fear that the Policy will be enforced against them, or if defendant, having blocked intervenors' speech on one occasion, is likely to do it again. They argued that one way to demonstrate that a defendant is likely to block intervenors' speech is to show that it retains unfettered discretion in enforcing the Policy. Based on the fear of injury argument, the court found that the defendant had failed to carry its burden of demonstrating that the wrong will not be repeated. This case can be distinguished from *Urofsky* in that it dealt with an admitted wrongful injury in fact.

ACLU v. Johnson,

194 F.3d 1149 (10th Cir. 1999). Defendants argued that the plaintiffs lacked standing because their suit was brought before the effective date of the challenged Act, "Dissemination of Material That Is Harmful to a Minor," which criminalized the dissemination by computer of material harmful to minors, and because the plaintiffs had not received a real and concrete threat of prosecution, nor have they demonstrated that they refrained from constitutionally protected conduct or actually violated the law. In borrowing language from *Virginia v. American Booksellers Assoc.*, 484 U.S. 383 (1988), the Tenth Circuit rejected this argument. In *American Booksellers*, the Court held that the injury in fact requirement of standing was met as the law is aimed directly at plaintiffs, who will have to take significant and costly compliance measures or risk criminal prosecution. The Tenth Circuit found that its plaintiffs were in a similar situation. This case can be distinguished from Urofsky in that it dealt with a real injury in fact, to-wit: criminal prosecution and financial expenditures.

IV. Discussion.

>Did the plaintiffs in Urofsky have standing? Did they suffer an injury in fact?

>Is a "chilling effect" sufficient injury for standing purposes?

>Should the Urofsky courts have considered the plaintiffs' standing?

SCHOOL DESEGREGATION AND BARRIERS TO INTEGRATION

Through the Looking Glass: The Ambiguous Legacy of School Desegregation

John Borkowski
Hogan and Hartson, LLP

The Barriers to Integration in the Mississippi Delta

Suzanne Eckes
University of Wisconsin

The Legal Journey in Desegregation: Kansas City School District

James Van Patten
University of Arkansas

EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

THROUGH THE LOOKING GLASS: THE AMBIGUOUS LEGACY OF SCHOOL DESEGREGATION

John Borkowski
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New Orleans, Louisiana

EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

MEMORANDUM

October 1, 2001

TO: Elementary and Secondary School District Clients

FROM: John W. Borkowski
Rose Marie L. Audette

RE: Fourth Circuit Rules in Charlotte Desegregation Case

The full United States Court of Appeals for the Fourth Circuit issued a lengthy decision on September 21, 2001 that is particularly relevant to school districts operating under desegregation orders in the states within the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) but that also may be of interest to other school districts. The decision in *Belk v. Charlotte-Mecklenburg Board of Education* affirmed a trial court ruling that Charlotte-Mecklenburg Schools ("CMS") had attained unitary status but reversed many aspects of the lower court's decision that had been challenged on appeal by CMS and the class of African American school children that originally brought suit in *Swann v. Charlotte-Mecklenburg Board of Education*. The *Swann* case was reopened in 1997, when an unsuccessful white applicant to a magnet school sued, claiming that the school district's use of race in magnet school lotteries was unconstitutional. Several other white families joined in the suit and sought declaration that CMS was unitary and an injunction prohibiting race-conscious practices. Among other things, the Fourth Circuit's opinion:

1) applied a clearly erroneous standard to uphold a unitary status determination;
2) reversed an unprecedented injunction that had restricted the school district authority;
3) found the school district immune from liability for race-conscious actions taken while under court order; and
4) reversed an award of attorneys' fees for the plaintiff-intervenors who sought unitary status.

Hogan & Hartson defended the school district in the trial and appellate court. CMS has decided not to appeal the Fourth Circuit's decision.

First, in finding that CMS had achieved unitary status, the Court of Appeals emphasized the importance of initial factual findings by the trial court, concluding that these will be affirmed "so long as the district court's unitary status determination rests on a permissible view of the evidence." This ruling indicates that the Fourth Circuit is likely to be very deferential to the conclusions of district courts adjudicating unitary status issues.

Second, the Fourth Circuit unanimously vacated a very broad injunction issued by the district court. The Fourth Circuit reversed the injunction which prohibited CMS from considering race in allocating educational opportunities on grounds that there was no "imminent threat of illegal action." The Court found that "freeing the school district from one court order only to shackle it with another was here an abuse of the district court's discretion."

Third, the Fourth Circuit reversed the district court's conclusion that CMS had acted unconstitutionally in operating a race-conscious magnet lottery while it was still under the *Swann* desegregation orders. The Court held that the school district was immune from liability for using race in assigning students to magnet schools because it was acting in good faith pursuant to the court orders. The Court noted that "it is necessary to afford a school board some latitude in attempting to meet its desegregative obligations."

Fourth, the Court of Appeals reversed an award of almost $1.5 million in attorneys' fees to counsel for the white school children. The Court of Appeals held that no "explicit statutory authority" authorizes attorneys' fees where private parties act as "private attorneys general" in seeking unitary status. The Court reasoned that civil rights statutes permitting attorneys' fees are inapplicable where, as in CMS' case, the school district is not found to have violated the Constitution or any statute in either attaining unitary status or in failing to seek it sooner. Moreover, the Court found a declaration of unitary status is not "an enforceable judgment" and that, therefore, the white plaintiffs were not "prevailing parties." Rather, the Court concluded, "the declaration of unitary status merely restores the parties to the status quo prior to the issuance of the desegregation decree."

Finally, the Fourth Circuit's decision has less significance for school districts that are not under desegregation court orders, although it touches upon some issues relevant to unitary school systems. For example, the Court did not reach the issue of whether diversity is a sufficiently compelling interest to support race-conscious government action and noted that this issue remains open in the Fourth Circuit. The Court noted in dicta, however, that CMS' challenged magnet plan, which included fairly strict racial balance guidelines, would be unconstitutional if adopted by a unitary school district.

If you have any questions about this decision or its implications for your school district, please feel free to call John Borkowski at (504) 593-0824 or Rose Audette at (202) 637-6454.

Through the Looking Glass:
The Ambiguous Legacy of School Desegregation

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Supreme Court gave tangible support to its promise in Green v. County School Board, 391 U.S. 430 (1968), that the school desegregation remedies required in principle by Brown v. Board of Education, 347 U.S. 483 (1954), must be effective in fact. Examining the most recent litigation in the Swann case, however, reveals several ways in which recent lower federal court decisions have limited the extent to which the promise of desegregation has been fulfilled in our country, where racial isolation and educational inequities persist in the public schools.

Even more troubling, the District Court's ruling in Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp 2d 228 (W.D.N.C. 1999), currently on appeal before the en banc United States Court of Appeals for the Fourth Circuit, includes a remarkable injunction which effectively forbids any effort to preserve the very desegregation that has been required for the last thirty years. This ruling is the most extreme example of recent federal court rulings against school districts implementing race-conscious desegregation measures.

The District Court in Capacchione addressed several interesting questions, one of which was not even properly before it. In grappling with the question of unitary status, which was before it, the Court faced two important issues concerning the nature of desegregation remedies: (1) Does remedying the vestiges of segregation in the area of student assignment mean implementing a fair and stable remedy or temporarily creating some level of racial balance; and (2) must a desegregation remedy ensure equal educational opportunities regardless of race?

Unfortunately, in answering these questions, the District Court in Capacchione gave little weight to the express demand for efficacious remedial measures contained in the Supreme Court's decision in Swann and Green and reflected in the original District Court orders in Swann. Instead, like several other recent decisions by lower federal courts, the District Court's decision in Capacchione glossed over these requirements and ignored evidence of continuing problems in a haste to end court-mandated desegregation.

The District Court in Capacchione also issued an advisory opinion and prospective injunction barring voluntary desegregation measures in the future. While the District Court's skepticism of voluntary race-conscious measures is not unique, its willingness to prospectively enjoin a school district that had not even proposed a post-unitary student assignment plan is unprecedented.

I. Does remedying the vestiges of segregation in the area of student assignment mean implementing a fair and stable remedy or temporarily creating some level of racial balance?

A. The original Swann orders suggest the former:

1. A desegregation remedy must be equitable and stable.

2. The Court ordered the school district to ensure that "pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265, 268 (W.D.N.C. 1970).

3. In addition, the Court subsequently required the District to achieve this desegregation in a fair and stable manner. In particular, it required the school district:

    a. to ensure that transportation burdens were shared equally among black and white students;

    b. to site schools "where they can readily serve both races"; and

    c. to monitor transfers to magnet schools so as to avoid resegregating other schools. Swann v. Charlotte-Mecklenburg Bd. of Educ., 379 F. Supp. 1102, 1103-08 (W.D.N.C. 1974).

A. The District Court opinion in Capacchione, however, suggests the latter: Merely temporarily achieving a level of racial balance is sufficient for a declaration of unitary status in the area of student assignment.

1. The Court found that evidence of practicable measures to comply with orders related to the fairness and stability of desegregation were not relevant and that it is unnecessary to "inquire into whether there are other practicable means available to achieve further racial balance." Capacchione, 57 F. Supp. 2d at 256.

2. The Court deemed it sufficient that many schools were racially balanced within a reasonable range of district-wide average, even though this was accomplished only temporarily and through unfair means.

3. The Court refused even to consider the school district's proposed remedial plan that would have improved racial balance in an equitable and stable manner.

A. The vacated panel opinion would have reversed and remanded for reconsideration.

B. The effective conclusion of the District Court in Capacchione – that temporary racial balance in student assignment is the principal goal of desegregation remedies – has been endorsed to some degree by other federal courts and is reflected in national statistics that indicate growing levels of school segregation.

I. Must a desegregation remedy ensure equal educational opportunities for minority and non-minority students?

A. The original Swann orders suggest that this is an important remedial goal for a desegregating school district.

1. The District Court found that segregation had "produce[d] inferior education" for African-American students. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291, 1296-97 (W.D.N.C. 1969).

2. The "inevitable result[s]" was an achievement gap between black and white students". Id.

A. The District Court in Capacchione was not troubled by the persistence of such an achievement gap or by evidence that it was perpetuated in part by failures to comply with explicit court orders regarding:

1. site selection;
2. faculty assignment; and
3. student assignment.

A. The District Court also was not at all concerned about second generation segregation issues such as:

1. tracking or
2. inequities in student discipline

A. Again, the vacated panel opinion would have remanded for reconsideration the issues raised in II.B.

B. The unwillingness of the District Court in Capacchione to recognize segregation-related causes of the achievement gap between minority and non-minority also is not at all unprecedented. While national statistics indicate a persistent achievement gap in many school districts, in fewer and fewer cases does it seem likely that court-ordered desegregation will provide an effective means of addressing that issue.

I. When a school district becomes unitary, is it allowed voluntarily to integrate its schools?

A. The Supreme Court's decision in Swann and the Fourth Circuit's decision in Martin clearly suggest that it should be.

1. "[S]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." North Carolina State Bd. of Educ. v. Swann 402 U.S. 43, 45, appeal dismissed, 402 U.S. 47 (1971).

2. "The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students." Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165, 1167 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

A. More recent Fourth Circuit decisions suggest that in pursuing racially diverse school enrollments, school districts may consider race only in an extremely narrowly tailored manner, if at all.

1. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000).

2. Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000).

A. The District Court in Capacchione ruled, although the issue was not properly before it, that race may never be considered by a unitary school district.

1. No post-unitary student assignment plan was proposed to the Court.

2. The District Court, nevertheless, enjoined the school district from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." 57 F. Supp. 2d at 294.

A. The vacated panel opinion would have vacated the injunction without addressing the ability of school districts to pursue voluntary desegregation measures.

B. Federal courts around the country, like the District Court in Capacchione, have created great uncertainty surrounding the use of voluntary desegregation measures today. However, a few patterns have emerged.

1. Most courts are likely to apply strict scrutiny in assessing race-conscious student assignment measures that are not pursuant to court order, and certainly those that involve merit-based selection for what are deemed to be unique educational opportunities, such as academically selective magnet schools. Therefore, a school district should be prepared to establish that voluntary race-

conscious policies and practices satisfy strict scrutiny; it must be prepared to show that the school district has a compelling interest justifying its use of race as a factor in its decisionmaking and that its program is narrowly tailored to advance that specific interest.

2. School districts should be aware that a court may reject the argument that promoting the educational benefits of diversity is a compelling interest and hold that any voluntary race-conscious student assignment measure is unconstitutional. On the other hand, some courts continue to find that promoting the educational benefits of diversity, avoiding racial isolation, and other non-remedial interests are sufficiently compelling to survive strict scrutiny.

3. The narrow-tailoring prong of the strict scrutiny test has been the most difficult for school districts to satisfy. Therefore, it is important that any race-conscious student assignment measure be carefully designed to meet its particular educational purpose in the least burdensome way possible.

Ultimately, the federal courts of appeals and the Supreme Court will have to resolve the questions of whether and in what circumstances race may be considered voluntarily by school systems, for the lower courts now are plainly divided on this issue. In the meantime, school districts should take a cautious approach in voluntarily continuing or implementing any student assignment practices that may be considered to be race-conscious. Ironically, therefore, the very measures constitutionally required by the Supreme Court in Brown and Swann not only have not been entirely effective in promoting integration and educational equity, but also now may be effectively prohibited, or at least discouraged, by the federal courts.

THE BARRIERS TO INTEGRATION IN THE MISSISSIPPI DELTA

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Introduction

In the 1954 *Brown v. Board of Education* decision, the Supreme Court held that segregation of children in public schools solely on the basis of race, deprived the children of the minority group of equal educational opportunities. In reaching their conclusion in *Brown*, the Court relied on the findings of psychologists and educators who had concluded from their research that segregation gave black students a sense of inferiority, which in turn impaired their motivation to learn and their success at school. The unanimous *Brown* decision was the starting point for a major change in American race relations and is consequently considered one of the most important events in recent United States history.

In the 1955 *Brown II* decision, the Supreme Court left the implementation of integration policies to the discretion of local authorities. The Court instructed the district courts to use "equitable principles" in "fashioning and effectuating the [desegregation] decrees" (p. 300). The district courts were also directed to enter order and decrees "with all deliberate speed" (p. 301). *Brown II* called for the dismantling of well-entrenched dual systems but the holding was also tempered by an awareness that complex problems would arise which would require time and flexibility (*Green v. County School Board*, 1968). However, when the Court granted this greater local flexibility, it effectively permitted some cities to delay integration as long as possible.

Delta County, as well as other Mississippi Delta communities, had a delayed response to the *Brown* rulings. Unlike the tumultuous integration of the Little Rock public schools in 1957,[1]

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[1] Arkansas strongly resisted the *Brown* opinion. The state legislature passed several statutes in an effort to maintain school segregation. In *Cooper v. Aaron* the Supreme Court rejected a request by the Little Rock School Board for a two and one-half year delay in implementing a

Delta County remained almost untouched by the *Brown* decisions until the mid-1960's. Even then, the only reason for the change of policy was that federal funding was linked to the integration of public schools; if the Delta schools failed to desegregate, they would not have received federal money. The fear of losing funds was the catalyst to the inauguration of the Delta County Freedom of Choice Program in 1965. The Freedom of Choice Program permitted students to attend the school of their choice. In Delta County, the Freedom of Choice program was the first step toward desegregation in which students could decide whether to attend either the historically white public school or the historically black public school. This first attempt at desegregation in Delta County, however, did not have much effect on the dual public school systems, as only five black students chose to attend the white public school, and no white students chose to attend the black public school (Interview, 1998).

In 1969, the state pressured Delta County to integrate its students and as a result the county decided to combine the black and white public schools to achieve integration. In response to the county's decision to integrate, most whites in Delta County, as in much of the Delta, countered court-ordered desegregation by building and sending their children to a white private school. In fact, Delta Private Academy, the predominantly white private school, still operates today and is located only one mile from the predominantly black public school.

The fiftieth anniversary of *Brown* is quickly approaching and school districts face racial divides as great as those in 1954. The current reality of segregation is puzzling, as both white and minority families share a belief that an integrated society with integrated schools would be

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court-ordered desegregation program 358 U.S. 1 (1958). The school board had sought the delay because of "extreme public hostility" towards desegregation. Governor Faubus dispatched units of the Arkansas National Guard to block the school board's planned desegregation of Central High School. This incident became known as the "Little Rock Nine."

better (Orfield & Eaton, 1996). Despite these beliefs regarding integration, segregation increased in the early 1990s and for the first time since the Supreme Court overturned segregation laws in 1954, southern public schools returned to greater segregation (Orfield & Eaton, 1996). More specifically, according to Orfield and Eaton, southern segregation grew significantly from 1988 to 1991 and segregation of black students across the United States also increased. The proportion of black students in schools with more than half minority students rose from 1986 to 1991 (Orfield, 1991). The share of black students in intensely segregated (90-100 percent minority) schools, which had actually declined during the 1980's, also rose (Orfield & Eaton, 1996). Further, the gap between black and white achievement levels, which were narrowed in the early 1970s and late 1980's was on the rise again in the 1990's (Douglas, 1994).

Purpose of the Study

Delta Private Academy is the private school in Delta County with an enrollment that is almost 100 percent white.[2] Delta Private Academy has never had a black student attend the school.[3] Delta Public School is the public school with an enrollment that is 98 percent black. The *Brown* decision has no legal power to further integrate the schools because Delta Private Academy is a private school and therefore there is no state action directing the resulting segregation. Accordingly, any integration that may occur must be the result of individual choice. The purpose of this study is to explore why the students of Delta County remain segregated by race. More specifically, the study identifies specific barriers to educational integration in Delta County.

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[2] Delta Private Academy has admitted a few Asian and East Indian students in the past. Exact numbers were unavailable.

[3] To date, no black student has applied to Delta Private Academy. During the interviews the faculty at Delta Private Academy indicated that they would accept black students. Some of the white parents interviewed did not share this belief.

The resegregation of American public schools has been detrimental for blacks. Research indicates that blacks attending integrated high schools have much greater college success than those attending segregated schools (Cambum, 1990). Indeed, students in the most segregated inner-city schools are so isolated from realistic competition and assessment that they and their parents believe they are headed for success. In actuality, the students in segregated schools are achieving at a level so low that failure in college is preordained.

Moreover, when students receive an education with other students from different races, tangible education and social benefits occur (Orfield & Eaton, 1996). It is difficult to assess the data on the social and educational effects of racial mixing; however, both opponents and proponents of mandatory desegregation plans agree that since the early 1970s, black students have attained higher educational achievement levels, particularly in younger grades, while white students' achievement levels have remained relatively constant (Orfield & Eaton, 1996). These academic gains in achievement may be attributable to racial mixing (Douglas, 1994).

Significance of the Study

To date, no research has been done on *de facto* segregation between a superior public school and an inferior private school in a rural community. Delta Private Academy, the predominantly white private school, is noticeably inferior because they have fewer certified teachers, course offerings, and extra-curricular activities. The public school also has its share of problems which will be discussed later in this dissertation; however, few objective observers would argue that Delta Private Academy is academically superior to Delta Public School.

Further, this research will be significant because no one has explored the phenomena of this type of segregation between an inferior private school and a superior public school in the Mississippi Delta or more specifically in Delta County. Additionally, in recent years, an increasing number of scholars have focused on the dynamics of racial change in individual communities, recognizing that much of the desegregation plans in the South differed greatly even among regions within a state (Douglas, 1994). Indeed, many of the most significant contributions to the research of the civil rights movement in the past several years have been local studies (Dittmer, 1994).

For these reasons, a local study with a focus on Delta County is necessary. Delta County is a typical Mississippi Delta county that did not attempt to integrate the public schools until the early 1970s and the county continues to have students racially divided between an inferior predominantly white private school and a superior predominantly black public school. Further, focusing on Delta County permits an examination of the process of racial change in the Mississippi Delta. The segregation in Delta County is consistent with the segregation in other Mississippi Delta towns in which white students continue to attend an inferior predominantly white private school and the black students attend the superior predominantly black public school. Therefore, the findings in Delta County could be applicable to other Delta towns.

Moreover, the Mississippi Delta and Delta County stories are different from the typical desegregation study that has already been researched (Armor, 1995; Rossel, 1990, 1995). For example, this paper will not discuss a busing plan, as many desegregation studies do (Orfield & Eaton, 1996; Douglas 1994), because the white private school is only one mile from the black public school. Further, this is not the usual story of whites fleeing the public schools to attend a superior public school in the suburbs or to attend a prestigious private school within the same community. Today in Delta County 40 percent of the residents are white. The white students are not fleeing to a prestigious private school in the same town, but rather they are choosing to attend an inferior private school one mile from the superior predominantly black public school. In identifying the specific barriers to educational integration, this study will answer why white parents are choosing to send their child to an inferior institution.

Finally, this study will reveal significant findings regarding the voucher issue. Critics of the voucher system argue that vouchers may resegregate the students (Rozmus, 1998). The research of this dissertation seemed to produce the same findings of these well-respected scholars. For example, the interviews revealed that a black student would not choose to attend Delta Private Academy if given a voucher, thus maintaining segregation.

The white parents indicated a general support for vouchers, as it would help offset the cost of their $2000 annual tuition at Delta Private Academy.[4] It appears that vouchers would increase the segregation that exists in Delta County. For example, the few white students who attend Delta Public School would now be able to afford to attend Delta Private Academy with a voucher. The black students, on the other hand, would not choose to attend Delta Private Academy because, in general, they believe that the institution does not offer a better educational opportunity. Thus vouchers would improve Delta Private Academy with greater student enrollment and increased funding. Vouchers would have a detrimental effect on Delta Public School, as they would lose white enrollment and funding. Vouchers would therefore perpetuate segregation in Delta County.

Conclusion

I lived in Delta County from 1994 to 1997. During the spring of 2001 I returned to Delta County in order to collect data for this study. Based on this research, I have identified five current barriers to educational integration in Delta County. These barriers will be discussed during the conference.

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[4] Some of the parents at Delta Private Academy feared excessive government entanglement if vouchers were utilized.

SCHOOL DESEGREGATION: RETROSPECT & PROSPECT

The Legal Journey in Desegregation: Kansas City School District

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The search for equity in access and in school funding remains a challenge in our 21st century. State and Federal Court rulings continue to challenge legislators throughout the nation to review school funding policies. As noted in *Your School and the Law* (2001) school desegregation lawsuits dot America's legal landscape from North Carolina to California. Some 350 school districts are under court orders to bus students and use other strategies to integrate ostensibly dual systems: one for Whites and one for Blacks. A number of school districts in Florida, Tennessee, Oklahoma, Colorado and Delaware have had their desegregation orders vacated, although legal challenges will remain in the future. Miami-Dade County's public school system, America's fourth largest, has been declared unitary with a majority-minority population of Hispanics, and Blacks. Judge William Dimitrouleas ruled court supervision imposed 31 years ago is no longer required. The district has 360,000 students, fifty-four percent are Hispanics, 32 percent black and 12 percent are white. The judge found the district has shown good faith commitment to the constitutional rights of its students by decades of compliance. Civil rights advocates found the judge's ruling regressive, and stated it would have disastrous impact because of ethnic polarity, lack of supervision and control over hiring of teachers and assigning students on a community basis (Florida School Desegregated, 2001).

In vacating desegregation orders in Hillsborough County Florida School Districts, the 11th Circuit Court of Appeals found increased concentrations of Black and Hispanic students were due to demographic shifts, not district policies. The Appeals Court ruled that a school board has no obligation to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control. The ruling is expected to be appealed (Your School and the Law, 2001).

Typical of the challenges are those in Arkansas where Pulaski Country Chancellor Collins Kilgore ruled that the state's funding formula for school districts discriminates against the poorer regions of Arkansas, which suffer from low property values that limit school funding. Judge Kilgore noted that taxation, political and cultural hurdles to a solution may seem to create a Gordian knot, a problem not to be solved. However, the judge noted that the one constant is the agreement that an adequate education for our children is a necessity. Kilgore stated that too many of our children are leaving school for a life of deprivation, burdening our culture with the corrosive effects of citizens who lack the education to contribute to their community's welfare but who will be unable to live their own lives except on the outer-most fringe of human existence. No problem we face as a state needs more attention (Arkansas' Education Dilemma, 2001). Kilgore viewed Arkansas' most pressing problem as preschool education and improving teacher salaries. Judge Kilgore's ruling is being appealed to the Arkansas Supreme Court. Meanwhile the Little Rock School District remains under federal court control while efforts are being made to have the district declared "unitary".

In early 2001, New York became the twentieth state to have its funding formula for public schools declared unconstitutional. (Twenty-eight state funding formulas in 19 states from 1971 to 1997 were held to be unconstitutional (Portman, 1999). In the 2000 census, for the first time in our history, individuals could identify themselves as belonging to more than one race. A multiracial society is emerging in which minorities will compete with one another for affirmative action programs leading to a merger of interests for political action. In major U.S. cities there is now a majority-minority population as the nation increasingly becomes more diverse. Immigrants, legal and illegal, are increasingly challenging school districts to expand school facilities, with some states such as Florida facing crowded classrooms as they try to build more new schools to meet the student population surge. Into the mix of an increasingly fragmented society with a growing number of single interest groups, is the continuing saga of desegregation litigation throughout the nation.

In an article *Dollars to Students, Not Districts* (2001), the Kansas City School District's Court order for improvement of the system was addressed. In 1986, a federal district judge ordered taxpayers to build an improved school system regardless of the cost. The judge ordered a near doubling of property tax rates to pay for amenities such as olympic-size swimming pools, a planetarium, greenhouses, a working farm and robotics classes. The Kansas City School District ended up with the highest per-pupil expenditures of the nation's 280 largest school districts. The experiment ended in 1999 when a judge found the Kansas City schools still failing and less integrated but after over ten years of improvement efforts was ready to be removed from court supervision. By 2,000 another judge placed the school district under federal court jurisdiction once again.

The Kansas City School District was stripped of its accreditation May 1, 2000 and was given two more years to improve its performance or face possible abolishment. The Missouri Board of Education stripped the Kansas City School District of accreditation in part because the district failed to meet any of the states 11 performance standards including dropout rates, graduation rates, reading achievement, standardized test scores and placement of students who completed vocational programs. The unaccredited district would have to pay tuition and transportation costs for its students who are admitted to another district in the same or nearby county (CNN, 2000.)

Forty-seven years after *Brown v. Board of Education of Topeka* (Brown I, 1954) the issue of desegregation remains an area of litigation. *Brown* I (1954), found education to be the most important duty for state and local governments and struck down the "separate but equal," theory noting that racially segregated public schools were inherently unequal. Due to the significance of the finding for some school districts, the Supreme Court delayed implementation for one year. In 1955, (*Brown II*) the high court ruled that a dual system of education must be ended "with all deliberate speed." There were differences among the states as to how that decision was interpreted (McCarthy et. al. 1998.) In 1994 the *Education Law Association* had one of the distant relatives of Brown discuss the case. The theme of the meeting was *Brown at Forty*. She told of how Thurgood Marshall, the only Black member of the Supreme Court, convinced the other members of the court to end segregation forthwith. Marshall said it was only fair that all children be given equal access to the best education available. "Let's go ahead and rule on the basis of fundamental fairness and justice," Marshall reportedly said. Marshall believed such a decision would not be difficult to implement. Members of the court concurred and the landmark Brown decisions became the law of the land. Contrary to Thurgood Marshall's belief that implementation of Brown would not be a problem, state governors in several southern states including Alabama and Arkansas fought for continuation of segregation resulting in eventual intervention by the Federal government. Although de jure segregation is relegated to the dustbin of history, new demographics are changing the face of America and the struggle for desegregation continues in inner cities. Recently white Californians became a minority, at 49.9 percent. Hawaii, Washington, D.C. and New Mexico are all have majority-minority cities. Florida and Texas may reach the majority-minority status within the decade. Some population centers in both states are already majority-minority. Racial, ethnic and culturally mixed intermarriages are increasing American diversity. While African Americans, and Latinos, especially in inner cities, still face poverty, racial profiling and imprisonment disproportionately to the general population, on the whole there is equal access to schools and jobs (Campo-Flores, Arian, Smith, Vern E., Breslau, Karen, Samuels, Allison, and Clemetson, Lynette (2000). The challenge is the quality of school facilities and education.

Desegregation remains an issue, however, in the Kansas City Missouri School District. A Federal District Court in *Jenkins v. Missouri* (1984) found continued effects of segregation in Kansas City, and between 1985 and 1987 the district court called for remedies that required a series of educational improvements. *Jenkins v. Missouri* (1985*)* called for converting most of the district schools to magnet schools. On September 15, 1987, the court ordered increased taxes to fund the district's cost of the remedy (*Jenkins v. Missouri,* 1987). In *Jenkins v. Missouri* (1988) the appellate court found that previous court decisions to raise taxes was too much intrusion into local affairs (Benson, 2000.)

Because of my own experience some 39 years ago, I became interested in the litany of Kansas City lawsuits, the mother of all desegregation cases. While I worked at Central Missouri State University as a supervisor of student teachers, I supervised a young student teacher at Van Brunt Parkway East High School (now an elementary school). As I entered the school one day, I noticed a hubbub of activity. Police were collecting weapons, which they placed in a pile in the main hallway. Blackjacks, knives, chains, belts, and a variety of other deadly objects were in the large pile. The principal said there had been a rumble and decisive action in the form of a shakedown was taken to curb prospective violence. As I visited classrooms, I saw that very little if any teaching was going on. Teachers were basically baby sitters trying to keep students orderly, and this appeared to be a losing battle. Student teachers were cautioned not to confront students as there were competing gangs that were part of the school culture.

Classrooms that I visited were 99 percent at risk minority children. The building was spotlessly clean and each classroom had some 30 to 40 students. My student teacher appeared nervous and tense with all the activity, police presence with administrators throughout the building. "What should I do?" she asked, noting the pile of weapons, some lethal, most that could cause serious injury. As a new professor and supervisor of student teaching, I was perplexed. What could I tell this young blond Caucasian girl that would give her proper guidance? Students were assigned to schools by the central office and moving to other schools within the system was discouraged. This was before and showed the necessity of diversity, ethnicity, multiculturalism, bilingual education, and postmodernism becoming widely researched, studied, and incorporated in educational theory and practice. Later that was to come with the rapid increase of a more diverse population. After a period of contemplation I thought of saying, "do your best to keep out of harms way. Possibly run out the front door," but I advised her to stick close to her supervising teacher or to go to the teacher's lounge or the principal's office until things calmed down and order was restored. I must admit I was as frightened as the young student teacher, and probably showed it. This situation at the high school underlined the need for implementation of diversity, multiculturalism, ethnicity, and racial issues in the formal and informal curriculum as well as the need for more funds to create smaller classes, the addition of mentors to assist teachers in reaching students with special needs, and improving student achievement.

Litigation plays a role in maintaining high expectations especially for minorities although such well intended action often leads to a lose-lose situation for all concerned. Educational lawsuits have proliferated throughout the country since the 1950s. On the positive side, lawsuits keep administrators, teachers, staff and the public aware of the vital need to provide equality of access to education and to improve outcomes for all children. On the other hand, there is a tendency for the proliferation of lawsuits much like those Charles Dickens wrote about in *Bleak House*. As you may recall, Dickens tale of lawsuits told how litigation over an inheritance went on for so long people forgot what it was they were suing about or who was involved in the lawsuit originally. All of the original litigants died and over the years the estate had been thoroughly dissipated. The only way the lawsuits ended was when there was no more money.

The *Education Law Reporter* includes an ever-growing number of cases affecting all aspects of the school system. A particularly lengthy desegregation case designed to improve educational access and achievement for minority children deals with the Kansas City School District. The difference between Dicken's story and the Kansas City Case is that when there is government litigation at taxpayers' expense, the lawsuits can go on ad infinitum. The Kansas City Case has been in litigation for over 23 years and Federal Courts have again taken over the school district after a brief respite.

Money: Ciotti (2000) reviewed the case that began in 1977 when some parents sued the Kansas City School District to gain improvements in the academic programs, alleging that the state, local community and surrounding school districts had caused racial segregation

Federal Judge Russell Clark in 1984 found the Kansas City School District and the state of Missouri responsible and liable for the segregated conditions in the city. If the city could not increase expenditures, the state had to make up the difference. Cotti (2000) noted that over the last 23 years, Kansas City has spent $11,700 per pupil on a cost of living adjusted basis, more than any of the 280 largest school districts in the nation. Funds were spent on higher teacher salaries, 15 new schools, an olympic-sized swimming pool with an underwater viewing room, television and animation studios, a robotics lab, a 25-acre wildlife sanctuary, a zoo, a model United Nations with simultaneous translation capability, and field trips to Mexico and Senegal. There was a student-teacher ratio of 12 or 13 to one, (one of the lowest of any major school district in the U.S.). During the past 23 plus years, White flight has changed the composition of the student body to an almost all-minority school district. Some of the flight was due to crime in the area, particularly after a White teacher was severely attacked. Property values declined and the 37,000-student district continues to seek funding in addition to the $2 billion of state and local funding in the past two and a half decades.

The saga would be incomplete without noting there were some unscrupulous real estate dealers who instigated White flight by spreading fear in order to buy property cheaply (occasionally as low as 25 cents on the dollar) and to resell to minorities for a high profit. Kansas City was not alone in facing this challenge. Large inner cities throughout the country faced the same educational challenges, but few have dragged on so long with litigation as Kansas City. Once federal courts take over school districts, it becomes difficult to extricate them from the legal process. Though the process is costly, it provides a stimulus to assuring equal access and maximum efforts toward providing quality education for all children.

Desegregation. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that public schools not be operated by the state on a racially segregated basis. The U.S. Supreme Court has firmly adhered to the view that *dejure* segregation, or a current condition of segregation resulting from intentional state action, is constitutionally impermissible. However, *defacto* segregation resulting from housing patterns or other factors beyond government control, does not violate the constitution. (Source: Deskbook Encyclopedia of American School Law (1996.) "Desegregation." Washington, D.C. Data Research: 357-358).

In 1977, the U.S. District Court for the Western District of Missouri ordered the elimination of all vestiges of state-imposed segregation. The Kansas City School District was 70 percent African-American and the District Court ordered the implementation of quality educational plans. In *Jenkins v. Missouri* (1985) (affirmed 1986 by Court of Appeals) a voluntary interdistrict transfer plan became part of the desegregation remedy. Under the plan, Missouri was ordered to seek the participation of suburban districts in the program and to fund tuition and transportation costs for minority transferees. (This was reinstated in 2000. In *Jenkins v. Missouri* (1986), the Eighth Circuit Court of Appeals upheld the denial of a motion by students and their parents in Kansas City to intervene in the school desegregation suit. The court turned away the interveners' contention that their concerns were not sufficiently protected and found the plaintiff class adequately protected their interests (Russo, 1997).

In 1990 the Eighth Circuit Appellate Court, noting that no minority students had been admitted to suburban school districts, directed the district court to promulgate an interdistrict transfer plan (McCarthy, Martha M. and Cambron-McCabe, Nelda H. (1992). A number of initiatives were proposed. Judge Clark asked district administrators to shoot for the stars, to dream big. High schools, middle schools and some elementary schools were transformed into magnet schools to attract white students. The U.S. Court of Appeals, Eighth Circuit, affirmed the District Court ruling. The state appealed to the U.S. Supreme Court on the basis that the District Court had called for a budget that exceeded the Kansas City School District's authority to tax and there was a lack of evidence that academic achievement was the result of past discrimination. The U.S. Supreme Court in *Missouri v. Jenkins* 1 (1990) held that Federal Courts can order school districts to impose tax increases to fund desegregation remedies, but the court itself cannot impose such increases. Previously the state had been assessed three-fourths of the costs of a magnet program and capital improvements for desegregation. The Supreme Court held that the Appeals and District Court abused its discretion by directly imposing a tax increase rather than instructing the school board to do so (McCarthy, 1992).

Interdistrict Remedies. *Missouri v. Jenkins 11* (1995) reversed the District Courts ruling and found that the Court had exceeded its authority in establishing Magnet schools to prevent White flight, and in ordering the state to contribute to salary increases. Quality education programs and capital improvements were noted. McCarthy et. al. (1998) wrote that the Supreme Court evaluated the 18-year history of Kansas City desegregation orders. It found that the district court had ordered $220 million for program improvements to advance desegregation (full-day kindergarten, an expanded summer school program, before-and-after school tutoring, early childhood development programs, and an effective schools program), $448 million for comprehensive magnet schools and related transportation, $540 million for extensive capital improvements, and $200 million for salary assistance. In addition every high school classroom had air conditioning, an alarm system, fifteen microcomputers, a green house, a planetarium, broadcast-capable radio and television studios, an art gallery, swimming pools and much more. By 1994, with average annual costs of $200 million the Kansas City desegregation case was the most expensive remedial program in school desegregation history (McCarthy, 1998).

A Kansas City School District request to continue and expand an eighteen-year-old continuing court order requiring the state to fund "remedial quality" programs because student achievement levels were at or below national norms, was reviewed. Pulliam and Van Patten (1999) noted that although future deliberations may result in different conclusions, the Supreme Court in *Missouri v. Jenkins 11* (1995) after asserting that states cannot deny access in education due to race, noted that we must forever put aside the notion that simply because a school district today is Black, it must be educationally inferior. The court noted that at some point we must recognize the judiciary is not omniscient and that all problems do not require a remedy of constitutional proportions. The court continued by stating that usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere but also deprives the states and their elected officials of their constitutional powers.

The Supreme Court (1995) held that the lower court erred in ordering Missouri to provide funds for Kansas City schools as part of a desegregation plan designed to lure White students from surrounding districts (Fischer, Schimmel, and Kelly, 1999). The majority opinion, in this 5-4 case, written (1995) by Chief Justice Rehnquist, demonstrates reluctance to link school segregation and residential segregation to a desegregation order. The majority opinion also indicated the Federal trial courts should seek to restore control of the school system to local and state authorities as soon as possible (Fischer et. al.). In *Jenkins v. School District of Kansas City, Missouri* (1999), the Kansas City School District moved to have the Federal District Court invalidate the state board of education's designation of the district as "unaccredited" because it failed to meet any of the eleven performance standards used to evaluate and classify state public schools.

The school district argued that an unaccredited status would lead to more flight to charter schools, create financial hardship and hinder desegregation efforts.

Over the years, the Court has provided the procedures for getting a school system out from under court supervision. The procedure entails getting a declaration that the school system is unitary and is not running dual systems for Black and White students. The Federal Court found that the district had complied with court orders and had made every practicable effort to eliminate vestiges of prior segregation. The court modified prior orders so the district would be relieved from further liability and removed from court supervision. The relief for the district was short lived (Rossow, 2000). In the Jenkins case (1999), it appeared that the district court had ruled that the school system had achieved unitary status without holding a hearing. A hearing was a court ordered regulation for unitary status. After reading the Supreme Court's comments in *Missouri v. Jenkins* (1995), it is interesting that the 8th Circuit Court of Missouri recommended the appointment of a new judge and has reinstated the desegregation case again in *Jenkins v School District of Kansas City, Missouri* (216 F.3d 720, 2000).

The district is still under court supervision. The effort to achieve unitary status will remain a challenge for the future. All parties signed off on the St. Louis desegregation case. Educators, administrators, parents and the public need to cooperate in a spirit of good will and mutual respect to resolve one of the nation's longest running desegregation cases. Emotions, politics, and "hardening of the categories", need to be addressed in reaching for a solution to the Kansas City School District case.

The achievement gap between minorities and Whites persists. Manzo (2001) reported math progress in a nationally representative sample of 43,000 public and private school students but a continuing gap of some 30 points between White and minority fourth graders with similar gaps in other grades. It is noteworthy that both groups showed progress although fewer than 40 percent of Black students and half of Hispanic students could demonstrate capability with basic skills. The report from the *National Assessment of Educational Progress* survey referred to some students with disabilities or limited English proficiency who were allowed to received special assistance---more time, the use of adaptive technology-- while others were not given this assistance.

Influenced by recent protests against standardized testing, President George W. Bush encouraged Congress to avoid setting impossibly high expectations and identifying all schools as failures. Robelen (2001) reports that Congress is having a difficult time defining adequate achievement levels for accountability and avoidance of federal penalties. The challenge of school improvement for all students and Bush's slogan of "leave no child behind," will continue to bedevil policy makers.

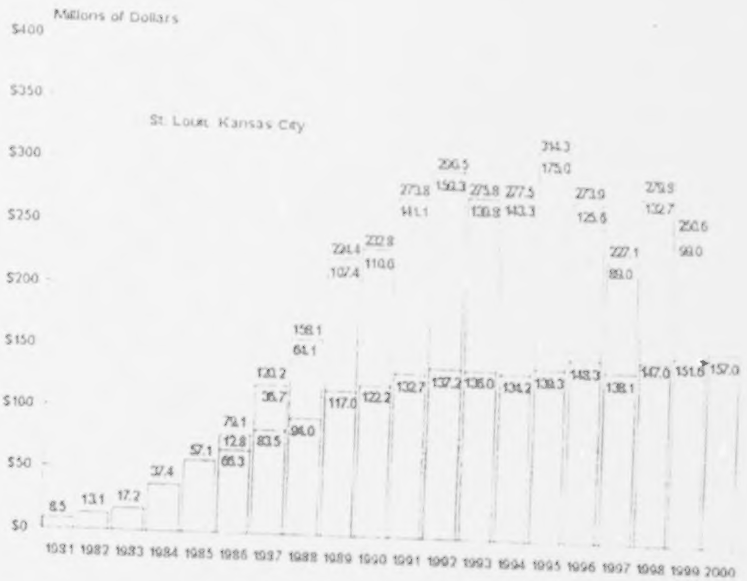
DESEGREGATION

The Fiscal Year 2000 budget marks a historic close in the desegregation chapter of Missouri history. With the end of the Kansas City case, and the potential end of the St. Louis case, there will be dramatic improvements in education funding for schools across Missouri. This was made possible by a positive and pro-active approach to resolving this litigation from the Governor, the Attorney General, and the Missouri General Assembly. The Kansas City case was settled in 1997. In the 1998 session, the legislature passed SB 781, which established a framework for settling the St. Louis desegregation case. A settlement agreement was reached in January 1999 to end court-ordered supervision in St. Louis. The settlement is contingent upon voter approval of local matching funds for SB 781 formula revenues in a St. Louis City election on February 2, 1999, and approval by the federal judge.

Settlement negotiations in Kansas City have resulted in substantial saving to boost state aid to all Missouri schools. In Fiscal Year 2000, ongoing savings totaling $187.4 million and cumulative one-time savings of $81.5 million have been redirected to Missouri schools. State law requires that desegregation savings go toward the school foundation formula and transportation funding.

As of December 31, 1998, the state has spent $3.3 billion on the desegregation cases in St. Louis and Kansas City. At the end of Fiscal Year 1999, that total will reach an estimated $3.4 billion. Actual spending may vary from this estimate due to actions or inactions of the school district, the number of students, future court orders, and the expenditure patterns of the school district.

COURT-ORDERED
DESEGREGATION PAYMENTS
FOR FISCAL YEARS 1981-2000
(without St. Louis settlement)



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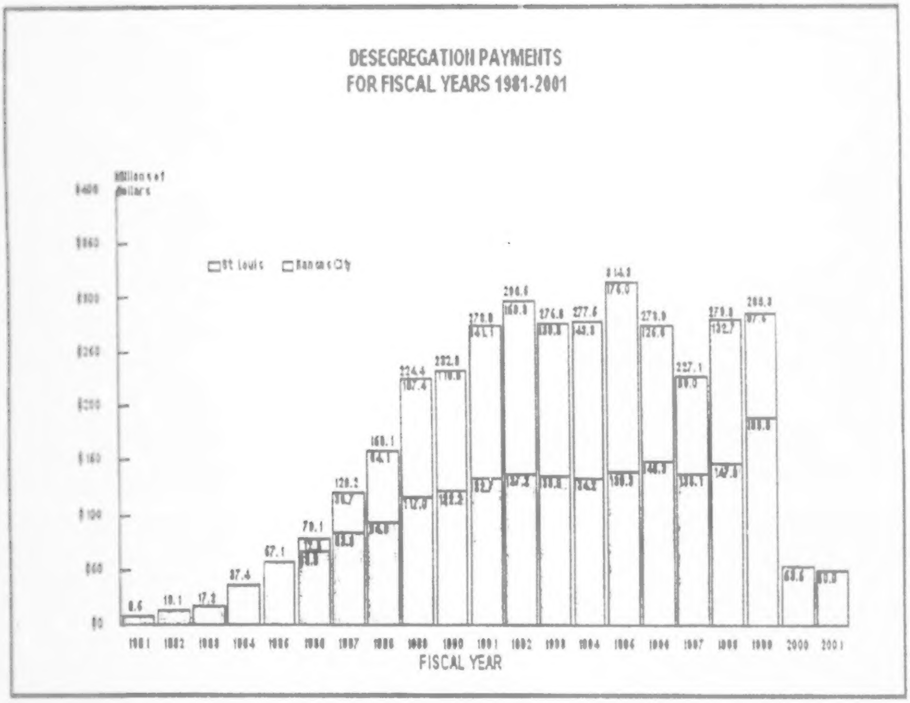
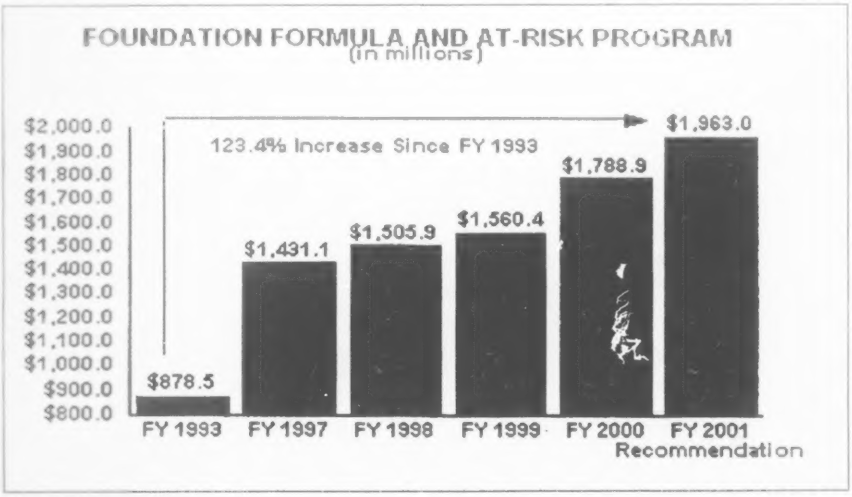


FISCAL YEAR 2001 CAPITAL IMPROVEMENTS BUDGET



Dale Carleson, Assistant Director of School Finance, Department of Elementary and Secondary Education (2001, August 16) noted that there is no capital funding going to St. Louis and very little to Kansas City. The issues of high taxes for the Kansas City School District is still an area of contention.

A U.S. District Judge, who felt the district was not trying hard enough to improve, dismissed the case due to good faith and costly efforts on the part of the school district to raise standards. An appeals court, through a series of legal maneuverings, reinstated the desegregation case. This was partially due to the Missouri Board of Education's action in removing accreditation from Kansas City Schools due to failure of the district to meet the state's minimum performance standards. Although three appellate judges were asked not to rule on the Missouri State Department of Education's action in revoking the district's accreditation, the Court of Appeals reinstated this 23- year-old desegregation case. The most recent Federal Court of Appeals ruling in *Jenkins et. al. v. State of Missouri* (2000) placed the Kansas City School District under the Court's jurisdiction and under desegregation orders. The case has gone through appeals and rulings for over 23 years (Benson & Associates, 2000). This case demonstrates a commitment to providing quality education for all children as well as a failed desegregation plan and policy.

Other cases throughout the nation continue to address the issue of desegregation. *Ho by Ho v. San Francisco Unified School District,* 147 F. 3d 854 (9th Cir.1998) ruled that the San Francisco desegregation case must proceed to trial on the basis of possible discrimination against Asians. Federal Court judges have worked diligently to gain a handle on the challenge of racial balance, together with improving educational outcomes for minority children. They have sought the advice of educational consultants many of whom have different views and analyses of the issue of desegregation. High paid Federal Monitors have been hired to oversee the District's efforts to meet Federal Courts' mandates to improve educational achievement, racial balance, and assessment benchmarks.

Kansas City Desegregation in Retrospect and Prospect. The case indicates the difficulty of dealing with what often seem intractable issues. The State of Missouri paid over half of the $2 billion settlement. The courts and the State Department of Education in Missouri evaluated schools by dropout rates, attendance rates and test scores. In the latest court rulings (2000) there were repeated suggestions that the Kansas City, Missouri school district had not done enough in improving education within the district. The meaning of "not done enough" will be explored more fully in future court decisions.

Improving education at all levels is a popular political issue and both parties' candidates are promising more federal aid to education at all levels as well as reemphasizing accountability, and assessment. Although controversial, teachers in Florida and elsewhere are working hard to teach to the test and Kansas City administrators and teachers are committed to improving test scores of students within the district regardless of the costs. The school system in Palm Beach County Florida, from top to bottom, was involved in supervising required student assessment examinations while regular school activities were brought to a halt. Throughout the nation a culture of assessment has emerged in which student achievement levels are measured and benchmarked against other schools and school districts. The Kansas City Case is an interesting and continuing saga..

Hope springs eternal in the heart of educators and there are major efforts to rapidly improve inner city students' tests scores in Kansas City. Kansas City School Superintendent Benjamin Demps reported that loss of accreditation would not affect graduating seniors. He said that the district's top priority would be to regain accreditation and noted that the district has had problems over the years with the quality of educational administrators within the district. "Everything we do at this point forward must be focused on improving the performance of all our students on the Missouri Assessment Program Tests," (CNN, 2000). On July 28, 2000 a federal judge named another monitor for the city's schools in Kansas City's ongoing desegregation case. Former Truman State University President Charles McClain was named as the new monitor for the district's efforts toward making court-ordered improvements (Kansas City Channel, 2000). Johnson (2000) notes that the Kansas City School District has been forced to compete with some 17 charter schools with more on the way. One of the charter schools is having financial challenges and may have its charter pulled. He also reported on increasing complaints from the Black community, like that of a black lawyer whose daughter will graduated from a Kansas City high school. The lawyer blames the district for putting too much emphasis on the racial makeup of the schools, rather than concentrating on academic standards. The district failed to meet ten of the eleven test score standards for Missouri's performance benchmarks. Wildavsky (2000) notes that Kansas City School District has had a series of court appointed monitors and 19 school superintendents in the last 30 years. If the school district does not meet state standards in the next two years, it may be taken over by the state or broken up into smaller districts.

Observations. 1) Where possible and feasible, exploring ways to get parental, or child caregivers' involvement in education would pay big dividends in student achievement improvement. Finding and getting fathers involved in their children's education is an ongoing process. Seeking community resources to assist in increasing student motivation is an important task, also encouraging parents and/or caregivers to help teachers in their efforts to have students realize the long term value of completing high school is helpful.

2) Helping at-risk students to believe in themselves and enhancing their self-esteem would be beneficial in increasing motivation. High expectations should be part of any program to increase student achievement results. All educators need to treat all students with civility, comity, and respect their individual differences.

3) Another problem in desegregation issues lies in the fact that in major cities in the U.S., the majority of the population is the minority. California's population currently typifies this trend with more minority than majority citizens. Orlando, Florida school district is over 51 percent minority student population. The focus should be on academic achievement and remedial programs when needed for all students.

4) The high court has noted that at some point we must recognize that the judiciary is not omniscient and that all problems do not require a remedy of constitutional proportions. The solution to the desegregation problem may lie within the Supreme Court's (Missouri v. Jenkins 1995) recommendation to involve the local school district more fully. Civil rights advocates continue to recommend Federal involvement in desegregation efforts. In this case, the district court (2000) reinstated court management of the Kansas City Public Schools.

5) The Kansas City school district's legal challenges seem to suggest that money is not the answer to improving school achievement. Litigation has been costly to the state of Missouri and to the Kansas City School District as bureaucracy expanded exponentially through the years. Federal Court personnel have to

hire experts to fulfill their rulings, which have often proven costly, divisive, ineffective, instigating mass chaos and confusion. Certainly the intent of the members of the various District, Appellate and Supreme Courts was to improve education at all levels but there were unforeseen multiplier effects that added to the challenges for the school district.

6) The composition of judges on the Federal Courts will determine future trends and decisions in desegregation cases. Many of the high courts decisions are 5-4. Since several Supreme Court justices are advanced in years, the U.S. President and the composition of Congress will determine the direction of the court desegregation cases through their selection of future court judges. With one of the closest elections in history, George W. Bush's nominees will face intense scrutiny. With a closely divided Senate currently with a razor thin democratic majority, bipartisanship will be difficult to achieve.

7) Changing demographics may lead to a new language of consensus and a community of values that will release our Federal Courts from their concentration on the racial composition of school districts to a scholastic and academic focus on helping our nation's cultural mosaic be reflected in helping each child, regardless of ethnic, cultural, or racial backgrounds, reach the maximum of their potential.

8) There seems to be a trend toward excessive reliance on federal court supervision, once a school district is involved in desegregation cases. It may be seen as helpful to have Federal Court rulings as a key to gaining access to unlimited school funding which may work to the detriment of other school districts throughout the state.

James Bowman, Dean of the College of Education, Central Missouri State University reported that they are currently sponsoring eleven charter schools with more being considered, in Kansas City. Teacher education majors spent over 1600 hours in Charter Schools doing tutoring, small group instruction and mentoring. Funding for the teacher education work was provided by the Hall Foundation in Kansas City. Central Missouri State University sponsored the first charter school in Missouri. The University Board of Governors gave approval in December 1998 and it was opened in Kansas City in 1999 (James Machell, Doug Thomas, and Jim Bowman, 1999). Charter schools may help improve student achievement in the district.

There are no simple answers to the challenges facing educators and students as we move into the 21st century. People of good will, working together to increase jobs for inner city residents, improve living conditions, and provide assistance to classroom teachers and administrators, can help to ameliorate the challenges of inner city schools. Dag Hammaskjold once wrote that there are some problems we never really resolve. We just grow out of them through reaching another language level. When we reach that level, current litigation on issues of race and schooling may well be a footnote in history.

Gerald Portman, The University of Iowa; Dean James Bowman, Central Missouri State University, Mark Van Zandt, Missouri Legal Counsel, Jefferson City, reviewed this manuscript.

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Particulars in the Kansas City Desegregation Case.
Plaintiff class, representing the children of defendant school district in the Kansas City desegregation case, appealed the district court's ruling declaring the defendant unitary and dismissing the case with prejudice. The order followed a hearing set by the court to consider the defendant's amended motion for equitable relief from a ruling of the Missouri State Board of Education declaring that the accreditation of the defendant school district would be withdrawn effective May 1, 2000. After the district court denied the defendant's motion, it proceeded sua sponte to a discussion of the unitary status of defendant and declared the defendant to be unitary.

The issue before the court was whether the district court erred in determining the defendant to be unitary and dismissing the case without taking evidence or hearing arguments. The court concluded that the sua sponte ruling declaring the defendant unitary and releasing the admitted constitutional violator from further court supervision, without giving notice either to the constitutional violator or the victims, or permitting the parties to present evidence and argue these issues, was in error, and a violation of due process.

The order was reversed because the sua sponte ruling declaring the defendant unitary and releasing the admitted constitutional violator from further court supervision, without giving notice either to the constitutional violator or the victims or permitting the parties to present evidence and argue the issues, was in error. jvanpatt@aol.com

THE SUPERINTENDENT'S EMPLOYMENT CONTRACT

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
ALBUQUERQUE, NEW MEXICO

The Superintendent's Employment Contract
47th Annual ELA Conference, Albuquerque, New Mexico, November 15-17, 2001

By

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1) Background: The tenure of superintendents: Is it dropping?
2) Approaching the Superintendent's Employment Contract
3) Contract Fundamentals
4) Independent Legal Counsel
5) Form of the Basic Contract
6) The Contract Addendum
7) Term and Renewal of the Contract
8) The Evergreen or Rollover Clause
9) Salary
10) Termination of the Contract
11) Termination for Cause Provision
12) Golden Parachute-Severance pay
13) Duties of the Superintendent
14) Professional Growth and Outside Activities
15) Evaluation of the Superintendent
16) Professional Liability and Protection from Civil Liability
17) Medical Exam
18) Employment Benefits
    a. Sick days
    b. Vacation days
    c. Insurance—Health, Life, and Disability
    d. Retirement plans
    e. Annuity and Deferred Compensation
    f. Moving allowances
    g. Automobile Use and Expenses
    h. Cell phone
    i. Negotiations

* The results of a state-wide survey sent to public school superintendents regarding the above contract terms will be discussed.

CAN SECTION 1983 BE USED TO REDRESS VIOLATIONS OF THE IDEA?

Allan Osborne
Principal
Snug Harbor Community School
Quincy, Massachusetts

EDUCATION LAW ASSOCIATION
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Session E4

CAN SECTION 1983 BE USED TO REDRESS VIOLATIONS OF THE IDEA?

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Introduction

Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983

Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

IDEA, 20 U.S.C. § 1415(*l*) [added by the Handicapped Children's Protection Act of 1986, P.L. 99-372]

"Nothing in this part shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part."

Decisions where courts have held that § 1983 may be used to redress violations of the IDEA

First Circuit

Grace B. v. Lexington School Committee, 762 F. Supp. 416 (D. Mass. 1991)
A hearing officer found a school district's IEP to be inadequate and ordered the district to place the in a private special education school. When the school district failed to make the ordered placement the parent sought injunctive relief. The court issued a preliminary injunction ordering the placement. HOLDING: The court does not have jurisdiction to enforce the hearing officer's decision under the IDEA as the plaintiff was the prevailing party in the administrative action and the act provides access to the courts only to the aggrieved party. However, the court is empowered to issue a preliminary injunction under 42 U.S.C. § 1983 to enforce the hearing officer's order. [Citing *Robinson v. Pinderhughes* and *Digre v. Roseville Schools*].

Second Circuit

Quackenbush v. Johnson City School District, 716 F.2d 141 (2d Cir. 1983)
This lawsuit seeking damages was filed by the mother of a disabled student alleging that the school district had a policy of denying special education to disabled students for financial reasons. In the lawsuit she claimed that the student was denied the special education services to which he was entitled, and consequently suffered damages to his intellect, emotional capacity, and personality, and was impeded in acquiring necessary training. The mother claimed that a school district administrator had altered a parental permission for evaluation form and as a result the student was not evaluated. The district court held that the mother had sufficiently alleged claims under section 1983 and that a violation of the IDEA may give rise to a cause of action for damages that is enforceable under section 1983. The appeals court affirmed but remanded for further proceedings. HOLDING: Section 1983 supplies a right of action to a plaintiff who has been denied procedural safeguards under section 1415 of the IDEA and thus has not received the findings and decision of the administrative due process proceedings set out in the IDEA. The

school administrator's conduct, if established at trial as it is alleged, could render him personally liable for compensatory and punitive damages. However, the school district cannot be held liable for punitive damages. The school district should be held liable for those injuries caused by their actions which deprived the student of access to the administrative system and procedural safeguards guaranteed by the IDEA.

Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987)
The parents of disabled children filed suit under section 1983 against the Connecticut State Board of Education claiming that the Board failed to make bona fide attempts to resolve complaints against the Bridgeport Board of Education and the Department of Children and Youth Services. They further claimed that the state failed to fully implement and conduct informal complaint resolution procedures as required by federal regulations. HOLDING: Parents are entitled to bring a section 1983 action based on alleged violations of the IDEA or the due process and equal protection clauses of the Constitution.

Hiller v. Board of Education of the Brunswick Central School District, 687 F. Supp. 735 (N.D.N.Y. 1988)
In an action seeking reimbursement of tuition, the court allowed the parents of a learning disabled student to amend their complaint to include a claim for damages under section 1983 for procedural violations of the IDEA. The court determined that under the HCPA a section 1983 action was a viable cause of action. [Citing *Mrs. W. v. Tirozzi*].

Sean R. v. Board of Education of the Town of Woodbridge, 794 F. Supp. 467 (D. Conn. 1992)
Following a due process hearing in which it was determined that the school district had proposed an inadequate IEP, the district released the names of the student and his parents to the local newspaper. The parents filed suit claiming violation of their privacy rights. HOLDING: The plaintiffs had an expectation of privacy based on the IDEA and its procedural safeguards. The IDEA's implementing regulations prohibit disclosure of any personally identifiable information [34 C.F.R. § 300.571] and

require school boards to protect the confidentiality of personally identifiable information [34 C.F.R. § 300.572]. These safeguards were violated when plaintiffs' names were publicly disclosed. Interference with these rights constitutes a deprivation of the rights secured under section 1983. [Citing *Quackenbush v. Johnson City*].

Mason v. Schenectady City School District, 879 F. Supp. 215 (N.D.N.Y. 1993)
The parent of a developmentally disabled student filed this lawsuit against school officials in their individual and official capacities alleging procedural violations of the IDEA. The court denied the school official's motion to dismiss. HOLDING: Section 1983 is available to remedy deprivations of procedural rights guaranteed by the IDEA. Punitive damages against individual defendants are permissible under section 1983. [Citing *Quackenbush v. Johnson City School District*].

Cappillino v. Hyde Park Central School District, 40 F. Supp.2d 513 (S.D.N.Y. 1999)
The parent of a student with disabilities filed this lawsuit seeking monetary damages under the IDEA and section 1983 alleging that school officials violated the IDEA by graduating the student from high school before conducting an evaluation and without consideration of the findings and recommendation of that non-existent evaluation. HOLDING: Nothing in the IDEA precludes a claim for damages under section 1983. Indeed the IDEA expressly contemplates such claims.

Third Circuit

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995)
The mother of a student with disabilities filed a lawsuit seeking damages for the persistent refusal of school officials to evaluate the student and provide necessary special education services. Despite resistance by the school officials the mother eventually succeeded, through administrative hearings, in having the student evaluated and provided with special education services. The district court granted summary judgment for the school district on the damages claims. The appeals court reversed. HOLDING: In enacting the Handicapped Children's

Protection Act Congress specifically intended that violations of the IDEA could be redressed by actions under section 1983. Accordingly, section 1983 supplies a private right of action in the instant case.

Jeremy H. v. Mount Lebanon School District, 95 F.3d 272 (3d Cir. 1996)
A hearing officer ordered the school district to provide compensatory services to a visually-impaired student who had not been provided with an appropriate education. When the school district failed to implement much of the hearing decision, the parents filed a lawsuit seeking an order to comply with the IDEA. The district court dismissed on statute of limitations and failure to exhaust administrative remedies grounds; however, the appeals court reversed and remanded. HOLDING: A section 1983 action can be brought to enforce the decision of an IDEA administrative proceeding. [Citing *Robinson v. Pinderhughes*].

Fourth Circuit

Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987)
The parent of a disabled student brought suit claiming that the school district denied the student a free appropriate public education by failing to implement a favorable hearing decision. HOLDING: The IDEA does not contain any provision for enforcement of administrative orders. Thus, plaintiffs were left with a favorable hearing decision that they were powerless to enforce. Plaintiffs may pursue a remedy under section 1983 for deprivation of a right guaranteed by federal law.

Fifth Circuit

Teresa P. v. Alief Independent School District, 744 F.2d 484 (5th Cir. 1994)
The mother of a student with multiple disabilities sought attorneys fees under the IDEA, section 504, and section 1988 (which allows recovery of attorneys fees for section 1983 actions) after succeeding on a number of procedural and substantive claims. HOLDING: A section 1983 action cannot be maintained to seek relief that is available under the IDEA but can be maintained

in cases where procedural due process claims are involved. [Note: This case was decided before the HCPA was enacted when attorneys fees were not recoverable under the IDEA].

Angela L. v. Pasadena Independent School District, 918 F.2d 1188 (5th Cir. 1990)
In dicta in a footnote the court suggested that parents may file suit under section 1983 to obtain relief which otherwise is unavailable from the IDEA.

Sixth Circuit

Crocker v. Tennessee Secondary School Athletic Association, 980 F.2d 382 (6th Cir. 1992)
A learning disabled student filed this lawsuit against the athletic association under section 1983 seeking damages after he had been barred from participating in sports. Although the court denied an award of damages under section 1983 it implied that a section 1983 lawsuit could be filed to secure federally protected rights under the IDEA.

Seventh Circuit

Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997)
A class action lawsuit was brought on behalf of a class of infants with disabilities who were not receiving early intervention services under Part H of the IDEA. They sought a declaration that the state's failure to provide all eligible infants with early intervention services was a violation of Part H. They also sought an order for the early intervention services to be provided. The district court held that the plaintiffs had a cognizable claim under section 1983 to enforce their rights pursuant to Part H of the IDEA. The appeals court affirmed. HOLDING: Congress did not explicitly foreclose recourse to section 1983. Section 1415 makes it clear that Congress intended that a section 1983 remedy be available to the beneficiaries of the statute. The statutory language and the structure of the act make it clear that Congress did not intend that the remedies supplied in Part H ought to foreclose other avenues of relief. Although section 1415 predated Part H, its express language encompasses the entire chapter.

Reid v. Board of Education, Lincolnshire-Prairie View School District 103, 765 F. Supp. 965 (N.D. Ill. 1991)
The parents of a student with disabilities who had been successful in administrative proceedings filed a lawsuit seeking, inter alia, enforcement of the hearing decision under the IDEA. The court dismissed their IDEA claims but allowed them to amend their complaint to pursue a claim under section 1983. HOLDING: An action to enforce the rights secured under the laws of the United States is more appropriately addressed through a section 1983 proceeding.

Eighth Circuit

Digre v. Roseville Schools Independent School District No. 623, 841 F.2d 245 (8th Cir. 1988)
The parent of a special education student, who had briefly attended another school district, tried to re-enroll him as a regular education student in his former district. The mother rejected an offer to classify him as a special education student but to fully mainstream him as long as school officials could assess the student. The mother filed suit alleging that the school district violated the IDEA due process and status quo provisions. HOLDING: A section 1983 action lies when a defendant, acting under color of state law, violates a right secured by the Constitution or federal laws. An exception exists when a comprehensive remedial scheme evidences a congressional intent to foreclose resort to section 1983 to remedy statutory violations. Under 20 U.S.C. § 1415, as amended by the Handicapped Children's Protection Act, a parent is entitled to bring a section 1983 action based on alleged violations of the IDEA

Brantley v. Independent School District No. 625, St. Paul Public Schools, 936 F. Supp. 649 (D. Minn. 1996)
The mother of a special education student was successful in contesting an IEP in administrative hearings. However, she filed a lawsuit seeking general and punitive damages. In her lawsuit she claimed that she received the hearing decision more than 45 days after she made her request for a hearing, in violation of the IDEA's regulations. HOLDING: Because there is an enforceable

section 1983 interest implicit in the IDEA's procedural protections, plaintiffs may bring a lawsuit to enforce the procedural rights contained in the act's implementing regulations. [Citing *Digre v. Roseville Schools*].

Ninth Circuit

Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997)
A class action lawsuit was filed on behalf of eight school-aged children with disabilities, and others similarly situated, alleging that the school district failed to provide them with a free appropriate public education. HOLDING: Compensatory damages are available in section 1983 lawsuits predicated on IDEA violations. Section 1983 authorizes actions at law, or in equity, and there is no legislative history to suggest that Congress meant to limit the traditional scope of section 1983 remedies in the IDEA context. [Citing *W.B. v. Matula*].

Tenth Circuit

L.C. and K.C. v. Utah State Board of Education, 57 F. Supp.2d 109 (D. Utah 1999)
A lawsuit was filed by the parents of a learning disabled and communication disordered student claiming that the student had not received a free appropriate public education and had been denied due process protections. HOLDING: The IDEA permits parents to bring an enforcement suit under section 1983. Damages are available under section 1983 for procedural violations.

Eleventh Circuit

Manecke v. School Board of Pinellas County, 762 F.2d 912 (11th Cir. 1985)
The parents of a student with disabilities filed a lawsuit claiming that the school board failed to provide them with a timely, impartial due process hearing. The district court dismissed the claim but the appeals court reversed. HOLDING: When a party is effectively being denied access to the administrative mechanism in the IDEA, that party may seek relief under section 1983.

District of Columbia Circuit

Walker v. District of Columbia, 969 F. Supp. 794 (D.D.C. 1997)

A lawsuit was filed on behalf of a student with mild mental retardation claiming that for many years he was not given the special education to which he was entitled. Specifically, the claim states that he was misdiagnosed, denied timely administrative hearings, given improper evaluations, and deprived of services. HOLDING: The plain language and legislative history of section 1415(*l*) of IDEA indicates that Congress intended to preserve all civil rights remedies available under section 1983 to vindicate the rights created by the IDEA. Accordingly, a section 1983 action may be maintained.

Zearly v. Ackerman, 116 F. Supp.2d 109 (D.D.C. 2000)

A student's classification was changed from specifically learning disabled to seriously emotionally disturbed. However, by the start of the next school year the district had failed to issue a notice informing the parents if the student's placement would be changed or if it would remain the same. The parents then enrolled the student in a private school. The school district orally stated that it would fund the private school placement but paid the tuition bills sporadically and incompletely. The following school year the school district again failed to provide any notice regarding the student's placement. The parents then filed court action. HOLDING: The parents have provided ample evidence that the school district failed to provide a timely placement, failed to pay tuition bills in a timely fashion, and failed to perform basic administrative tasks. They are therefore in violation of the IDEA. The parents' claim for relief under section 1983 based on a violation of the IDEA may proceed.

Decisions where courts have held that § 1983 cannot be used to redress violations of the IDEA

First Circuit

Andrew S. ex rel. Margaret S. v. School Committee of the Town of Greenfield, 59 F. Supp.2d 237 (D. Mass. 1999)
A disagreement arose between the school district and the parents of an autistic student over whether an integrated or nonintegrated placement was appropriate for the student. A hearing officer determined that the school district's proposed IEP was appropriate but that its implementation was hampered by inadequate staff training and insufficient home-school coordination. Recommended changes were put into effect and the student attended the proposed program. However, the parents filed a lawsuit alleging that the school district intentionally denied the student an appropriate education. They sought compensatory and punitive damages under section 1983. HOLDING: Garden variety statutory violations of the IDEA cannot form the basis for a section 1983 action. Section 1983 is not specifically aimed at protecting the rights of disabled children. The statute's clear implication is that it is to be reserved for cases where the alleged misconduct is constitutional in proportion, not merely statutory. The legislative history of section 1415 of the IDEA supports a narrow interpretation of section 1983 in this context.

Fourth Circuit

Sellers v. School Board of the City of Manassas, 141 F.3d 524 (4th Cir. 1998), *cert. denied* 525 U.S. 871 (1998)
A lawsuit was filed on behalf of an 18-year-old student whose disabilities had only recently been discovered seeking compensatory and punitive damages under the IDEA, section 504, and section 1983. The student claimed that he was denied a free appropriate public education by the district's failure to identify his disabilities earlier. The Fourth Circuit affirmed the district court's dismissal of the lawsuit. HOLDING: While section 1415 of the IDEA preserves remedies under

the Constitution, the Rehabilitation Act, and other federal statutes, it simply fails to mention section 1983. The reference to other statutes protecting the rights of disabled students cannot be read to include section 1983, a general statute that mentions neither disability nor youth. Section 1415 does not permit plaintiffs to sue under section 1983 for an IDEA violation which is statutory in nature. Permitting the recovery of general damages through section 1983 for violations of the IDEA would subject school boards to damages exponentially greater than the tuition reimbursement they currently face under the IDEA. Section 1415 fails to express unambiguously a Congressional intent that IDEA violations be remedied by section 1983.

Eighth Circuit

Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996)
The parent of a multidisabled student filed a lawsuit seeking damages under section 1983 claiming that the use of a "blanket wrapping" technique violated the student's constitutional rights. The district court denied the school district's motion for summary judgment. The appeals court reversed. HOLDING: The school defendants' conduct in using the blanket wrapping technique did not violate the student's clearly established right to be free from unreasonable bodily restraint. The plaintiff's claims, based on alleged violations of the IDEA, cannot be pursued in a section 1983 action because general and punitive damages for the types of injuries alleged by the plaintiff are not available under the IDEA.

Hoekstra v. Independent School District No. 283, 103 F.3d 624 (8th Cir. 1996)
A student was successful in administrative hearings in having his IEP declared to be inadequate. Consequently the school district was ordered to provide after school tutoring as compensation. His parents filed a lawsuit under section 1983 alleging that the school district failed to develop a legally sufficient IEP and did not provide ordered tutoring in a timely fashion. The district court granted summary judgment for the school district and the Eighth Circuit affirmed. HOLDING: Because general and punitive damages are not available under the IDEA, the parents may not pursue claims under section 1983. They have failed to state a claim under the IDEA and thus

have failed to state a claim under section 1983.

Tenth Circuit

Padilla v. School District No. 1, 233 F.3d 1268 (10th Cir. 2000)

School officials frequently placed a student with medical and developmental disabilities strapped to a stroller unattended in a closet. This was done in contradiction to her IEP and in spite of the mother's statements that it should not be done. In one instance when the student was held in the stroller by a seatbelt and confined to a closet unattended, she toppled backwards and hit her head on the floor causing a skull fracture. After the student vomited blood, her mother was contacted but immediate medical attention was not sought for her. After unsuccessfully pursuing administrative remedies, the mother filed this lawsuit under section 1983 seeking damages for the deprivation of the student's right to a free appropriate public education under the IDEA. The district court held that damages were available under section 1983 but the Tenth Circuit reversed. HOLDING: The court agreed with the Fourth Circuit [in *Sellers*] that section 1415(*l*) left intact the Supreme Court's implication [*Smith v. Robinson*, 468 U.S. 992 (1984)] that the IDEA may not provide the basis for section 1983 claims. The U.S. Supreme Court considers *Smith* to be alive and well insofar as it asserts that section 1983 may not be used to remedy IDEA violations.

THE DUTY TO EDUCATE: POLICIES, PRACTICE, AND THE LAW

Alien and Homeless Students: A Duty to Educate

Bradley Colwell
Southern Illinois University

Brian Schwartz
Illinois Principals Association

Schools and LEP Students: The Law and the Practice

Donna Gardner
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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
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ALIEN AND HOMELESS STUDENTS: A DUTY TO EDUCATE

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In the United States, the concept of a free and appropriate public education (or FAPE) has come to be an expectation. However, when it comes to the education of special student populations, the question of what should be free and what is appropriate can be a difficult one.

Although adequate attention has focused on the educational rights of special education students, very little is known about the need and obligation to educate other special student populations, such as homeless students and alien students. A review of case law indicates that the primary legal concern focuses on the issue of student residency and consequent financial obligations on school districts, especially for those students with special needs.

The purpose of this paper is to focus on the aforementioned student populations and discuss the basic obligations of states and local school districts in providing an education and educational related services.

I. Homeless Students: The Stewart B. McKinney Homeless Assistance Act

In 1999, it was estimated that 700,000 Americans were homeless on any given day. Families with children represent a staggering 40 percent of the homeless population. Among the Nation's urban homeless, 25 percent are children (under the age of 18) and unaccompanied minors represent a full 3 percent of the urban homeless. *See*, National Coalition for the Homeless, http://www.nationalhomeless.com.

Until 1987, there was no federal law or policy addressing the education of homeless children. However, in that year, the United States Congress enacted legislation popularly known as the Stewart B. McKinney Homeless Assistance Act (herein "Act"). 42 U.S.C. 11301, *et. seq.* As amended in 1990 and again in 1994, the Act guarantees homeless students the "same free, appropriate public education…as provided to other children and youth." 42 U.S.C. 11431.

A. Purpose of the Act

The statement of policy regarding the education of homeless children is clear and straightforward, and provides as follows:

> **It is the policy of the Congress that --**
>
> **(1) Each State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youth;**
>
> **(2) In any State that has a compulsory residency requirement as a component of the State's compulsory school attendance laws or other laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and youth, the State will review and undertake steps to revise such laws, regulations, practices, or policies to ensure that homeless children and youth are afforded the same free, appropriate public education as provided to other children and youth;**
>
> **(3) Homelessness alone should not be sufficient reason to separate students from the mainstream school environment; and**
>
> **(4) Homeless children and youth should have access to the education and other services that such children and youth need to ensure that such children and youth have an opportunity to meet the same challenging State student performance standards to which all students are held.** 42 U.S.C. 11431.

B. Definition of homelessness under the Act

According to the Act, a "homeless individual" is defined as: (1) anyone who lacks a fixed, regular and adequate nighttime residence; and (2) anyone who has a primary nighttime residence that is a supervised shelter designed to provide temporary living accommodations, an institution that provides a temporary residence for individuals intended to be institutionalized or a place not regularly used for sleeping accommodations. 42 U.S.C. 11302(a).

According to the U.S. Department of Education, a determination of homelessness should be made on an individual basis. In a 1995 document entitled "*Preliminary Guidance for the Education of Homeless Children and Youth Program*," the Department outlined examples of homeless youth, including: children and youth in shelters; children residing temporarily in trailer parks or camping areas because they lack adequate living accommodations; children whose families are sharing housing space with others because of the loss of housing; children placed in foster care for lack of shelter space; children who are in state care for lack of any other place to live; runaways, sick or abandoned children; or children whose parents do not permit them to live at home. Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 Creighton L. Rev. 1209, footnote 22 (1998) (quoting *Preliminary Guidance for the Education of Homeless Children Youth Program*, U.S. Department of Education pp. 21-22 (June 20, 1995)).

C. Requirements of state and local education agencies prior to receiving grant funds

Under the Act, grant money is given to states and then distributed to local education agencies. However, before becoming eligible for grant funding, a state must first submit an application to the U.S. Department of Education that outlines compliance with certain preconditions. First and foremost, each state must establish an Office of the Coordinator of Education of Homeless Children and Youth. This Office is charged with gathering and reporting statistical information regarding homelessness in the state and coordinating services throughout the state. 42 U.S.C. 11432(g).

Additionally, each state must submit to the U.S. Department of Education a plan, which includes the following: (1) a description of procedures for the prompt resolution of disputes regarding the educational placement of homeless children; (2) a description of programs for school personnel to heighten the awareness of needs of runaway and homeless children; (3) a description of procedures to insure that homeless children who meet relevant criteria will be eligible for federal, state and local food programs; (4) a description of procedures that ensure homeless children will have equal access to the same public education programs as other children (including preschool and before/after school programs); (5) assurances that issues such as transportation and enrollment delays caused by immunizations, residency, lack of documentation and guardianship are addressed; (6) a demonstration that state and local agencies will remove barriers to enrollment; and (7) assurances that homeless students will not be isolated or stigmatized. State education agencies are also mandated to include in their plan assurances that local agencies will comply with criteria specified in the Act. 42 U.S.C. 11432(g).

After a state receives grant funds under the Act, they are required to distribute the bulk of funds to local education agencies that make application under the Act. 42 U.S.C. 11433(a). Local education agencies are in turn required to comply with several conditions, which include: (1) providing a description of services; (2) providing fiscal assurances; (3) providing a description of policies used to assure that homeless students will not be isolated or stigmatized; (4) providing homeless students with services comparable to other students regarding transportation, vocational programs, school meal programs and all other educational services for which the child is eligible; (5) maintaining student records for homeless students; (6) coordinating with local social service agencies and local housing agencies; (7) designating a homelessness liaison to work with children; and (8) assuring that all educational barriers are removed in educating homeless students. 42 U.S.C. 11433(g).

Local agencies are also required to meet the child's "best interest" in determining school placement. Although best interest is not otherwise defined, it includes allowing the child to continue in attendance at the school he attended before becoming homeless for the remainder of the year or for the following year if the child becomes homeless between academic years. Under the best interest test, the child may also be enrolled in any school in the attendance area where he in temporarily residing. Also, to the extent feasible, the parent or guardian is allowed to select school placement, regardless of whether or not the child lives with the parent. 42 U.S.C. 11432(g)(3).

D. Use of grant funds by state and local education agencies

States have broad discretion in distributing grants to local education agencies. 42 U.S.C. 11433(c). In turn, local education agencies may use the grants for the following purposes as they relate to the education of homeless students: (1) tutoring and instruction; (2) evaluation of students; (3) professional development for staff working with homeless children; (4) referral services for medical, dental an other health needs; (5) transportation; (6) early childhood education; (7) before/after school and summer programs; (8) record tracking; (9) training of parents of homeless children; (10) coordination of services between schools and social service agencies; (11) pupil services and referrals to such services; (12) domestic violence prevention; (13) adaptation of space and the purchase of school supplies; and (14) extraordinary or emergency assistance. 42 U.S.C. 11433(d).

E. Enforcement of the Act

In accordance with the Tenth Amendment to the U.S. Constitution, the McKinney Homeless Act cannot provide penalties to those states and local school agencies that violate the Act. U.S. Const. Amend. X. (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.)

Because the subject of education is not enumerated in the U.S. Constitution, the power of regulation is left to the states. Therefore, as with most federal educational programs, the only power that the federal government has is to withhold grant funds to those states that do not comply with the requirements of the Act.

F. Federal interpretation and case law

There is very little administrative or case law regarding the McKinney Act. In fact, the aforementioned *Preliminary Guidance for the Education of Homeless Children Youth Program* is the only federal pronouncement regarding the implementation of the Act. Additionally, the following cases are relevant in interpreting the Act:

Orozco by Arroyo v. Sobel and *Harrison v. Sobel*: In these cases, lawsuits were brought for failure to comply with the McKinney Act and the State of New York's education law. In each case, a homeless family's children were denied admission to school based on their failure to establish a residence. However, both cases were adjudicated on state law claims and the McKinney Act played no part in either court's decision. *See Generally, Orozco by Arroyo v. Sobel*, 674 F.Supp. 125 (1987) and *Harrison v. Sobol*, 705 F.Supp. 870 (1988).

Lampkin v. District of Columbia: In this case, parents of homeless children in the District of Columbia sued under 42 U.S.C. 1983 in order to enforce provisions of the McKinney Act pertaining to the education of their children. The sole question before the court concerned whether homeless children can enforce the McKinney Act under a federal civil rights statute. In reversing and remanding the case, the appellate court ruled in favor of a private cause of action to enforce the McKinney Act under 42 U.S.C. 1983 and ruled that once a state accepts grant funds it is obligated to assure that the provisions of the Act are enforced. *Lampkin v. District of Columbia*, 27 F.3d 605 (1994).

On remand, the federal district court issued a temporary injunction in accordance with the child's "best interest" standard and provided that children entering homeless shelters must be referred for school placement within 72 hours. The court also held that transportation arrangements must be made for students and parents who are temporarily living more than 1.5 miles from school. *Lampkin v. District of Columbia*, 879 F.Supp. 116 (D.C.C. 1995).

The *Lampkin* victory was short-lived, as within two months of the court's decision the District of Columbia informed the federal district court that it would no longer participate in the McKinney Act's grant program because of fiscal costs and moved for a dissolution of the injunction and dismissal of the case. The court granted the District of Columbia's motion. JoAnn Grozuczak Goedert, *The Education of Homeless Children: The McKinney Act and its Implications*, 140 Ed. Law Rep. 9, 16 (2000).

II. Education of Illegal Alien Students: *Plyler v. Doe*

A. Summary of the case

In 1975, the Texas Legislature revised its education policy to withhold financial aid from local school districts for educating students who were not "legally admitted" to the United States. Under the new law, local school districts were also allowed to deny enrollment to children who were not in this Country legally. *Plyler v. Doe*, 457 U.S. 202 (1982).

The U.S. Supreme Court granted *certiorari* and consolidated two cases in which students who were in this Country illegally and resided in Texas challenged the constitutionality of the above-referenced Texas law. *Id.* at 205

The Court first addressed the issue of whether the Equal Protection clause of the Fourteenth Amendment applied to aliens who resided in this Country illegally. The State argued that the Equal Protection clause provides that no person "within its jurisdiction" shall be denied equal protection. The State compared the Equal Protection clause to the Due Process clause, which states that no person shall be deprived of "life, liberty or property, without due process of law" and does not contain the jurisdictional limitation of the Equal Protection clause. The State therefore concluded that the Equal Protection clause was not applicable to illegal aliens because they were not in this Country legally and, therefore, could not be considered persons within the State's jurisdiction. *Id.* at 210.

The Court dispatched of the State's argument, ruling that the Fourteenth Amendment is not confined to the protection of U.S. citizens and that all provisions of the Fourteenth Amendment applied universally to all persons in the State, whether they aree there legally or not. Quoting *Wong Wing v. United States*, the Court reasoned that illegal aliens are considered "persons within the territory of the United States" and are allowed to invoke the protections of the Fifth and Sixth Amendments to the U.S. Constitution. *Id.* at 212 (*quoting Wong Wing v. United States*, 163 U.S. 228, 238 (1896)). The Court found no distinction in the Fourteenth Amendment that would limit the applicability to only persons within the jurisdiction legally. *Id.* at 212. In sum, although noted scholar/songwriter Phil Collins has suggested that "its no fun being an illegal alien," the Supreme Court has held that the Fourteenth Amendment still applies to this group of individuals.

The Court next turned to the larger question of whether the Equal Protection clause invalidates the Texas law providing for differential treatment of illegal aliens in the educational arena. *Id.* at 216. In a narrowly divided opinion, the Court concluded that the Texas statute was unconstitutional from an equal protection perspective. *Id.* at 230.

In its analysis, the Court carefully considered the question of whether the Texas statute should be analyzed under a rational basis or strict scrutiny approach. The Court noted that undocumented aliens cannot be considered as a suspect class, nor is education in and of itself a fundamental right. Therefore, under normal circumstances, the State would only need to show that the law in question bears some reasonable relationship to a legitimate state purpose. However, the Court's majority was not willing to utilize the mere rationality test due to the area of special sensitivity that education entails. Thus, the Court created an intermediate Constitutional test under which to examine the Texas statute. *Id.* at 216.

Finding that a lack of education imposes a lifetime hardship and that students are not responsible for the illegal status of their parents, the State's policy cannot be held to be rational unless it furthers some substantial state goal. The Court held that a child's illegal status in and of itself or the State's interest in preserving limited educational resources did not rise to the level of a substantial state goal; thus, the Texas policy did not meet constitutional muster. *Id.* at 224.

In a strongly worded dissent, Justice Burger rejected what he called the "quasi-fundamental rights analysis," asserting that a rational basis equal protection test should have been applied instead. *Id.* at 242. Furthermore, the dissent reasons that the controversial Texas law had a rational basis that was related to a legitimate governmental purpose and that, as far as illegal aliens are concerned, education should not be distinguished from other governmental benefits. *Id.* at 246.

B. Analysis of the case

In its decision in *Plyler*, the Court did not completely rule out the possibility that a state law regulating the education of illegal aliens could pass constitutional scrutiny. However, the Court left little room for a state to establish a rational policy that meets a substantial state goal. Indeed, the high Court took great care to specify that, absent a federal policy, a state cannot deny an illegal alien an educational benefit solely based on his illegal resident status. *Id.* at 224. Nor were preservation of educational resources or state protection against an influx of illegal aliens sufficient to establish a rational policy meeting a substantial state goal. *Id.* at 227.

Since the *Plyler* decision, no state has directly challenged the right of illegal aliens to receive an education. However, it is worthy to note that the Court has changed significantly since its 1982 decision. None of the Justices in the majority are currently on the Court, while two of the dissenting Justices, Rehnquist and O'Connor, currently sit on the high Court.

C. Impact of *Plyler* in other situations

Since the Supreme Court ruled that the Equal Protection clause of the Fourteenth Amendment applies to illegal aliens, it seems only rational that future lawsuits will seek to extend educational opportunities to this student population. Based on the analysis in *Plyler*, it could be argued that illegal aliens are entitled to protection from discrimination based on disabilities or English language deficiencies and could assert the right to special education or other programs to address their independent educational needs. Additionally, *Plyler* might be relied on to assert rights to other governmental benefits in an educational context. Martha M. McCarty, *Plyler v. Doe: Issues and Implications*, 7 Ed. Law Rep. 235, 239 (1983).

Further, it has been argued that the rationale in *Plyler* could be used to invalidate school vouchers, charter schools and academic admission requirements. Under this theory, poor families would constitute a burdened class to the same extent as aliens did in *Plyler* and could argue that any extra costs associated with school choice programs amount to "an unconstitutional infringement of their interest in equal educational opportunity." Stuart Biegel, *The Wisdom of Plyler v. Doe*, 17 Chicano-Latino L. Rev. 46, 51 (1995).

III. A Note Concerning The Education Of Foster Children & Native Americans

Since *Plyler*, two other student populations have relied upon the Supreme Court's holding to establish that all children should be afforded a FAPE: foster children and Native American students. However, there is minimal statutory and case law that addresses the education of these two student populations. Nonetheless, a review of the case law does provide some insight into the potential education-related legal issues.

Foster Children: The primary case out of the federal court system is *Nancy M. v. Scanlon*, a 1987 case from the federal district court of Pennsylvania. At issue was a Pennsylvania statute mandating school districts to provide a free education to every child in the school district of his/her residence. Statutory law defined a child's resident school district by where his/her parents or guardians resided, not by where the child lived. A paid foster parent was neither a parent nor guardian within the meaning of the statute. Foster parents challenged the constitutionality of this law, claiming it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Nancy M. v. Scanlon*, 666 F.Supp. 723 (E.D.Penn. 1987).

The district court reviewed the *Plyler* case and determined that foster children are entitled to an intermediate level of scrutiny. The court made the determination that these students "comprise a discrete groups of persons who, in the vast majority of cases, lack responsibility for and control over their status... ." *Id.* at 727. The court then quickly determined that the statute violated the Equal Protection clause because the State could not show that foster children were situated differently from other non-resident children, so far as education was concerned, or that the classification was substantially related to the achievement of the State's interest in providing an economical and efficient public education.

Native Americans: The legal issues surrounding the education of Native Americans students have been somewhat more complex. It is beyond question that these students are entitled to an education; however, the issue becomes whether the federal or the state government has the ultimate responsibility to educate these students. This becomes an issue because of the involvement of a federal agency, the Bureau of Indian Affairs (BIA), which provides educational services to Native American students.

Courts have held that the existence of a BIA school does not justify the exclusion of Native American children from public schools. *See, e.g., Piper v. Big Pine School Dist*, 226 P.926 (1924) and *Grant v. Michaels*, 23 P.2d 266 (1933). In *Piper*, the California Supreme Court held that a public school district could not refuse to admit a Native American student even though the student could have attended a BIA school within the territorial boundaries of the district. However, different BIA schools may provide different services depending upon the need in a geographical area. For example, in *Meyers v. Bd. of Educ. of San Juan School Dist.*, a district court judge ruled against Native American parents' in a lawsuit to compel a local school district to provide secondary school facilities. The court ruled that even though providing an education to Native American students is the responsibility of both the federal and state government, it is not necessary to provide duplicative services. Where one entity is already providing education services to Native Americans, another entity's obligation to do so could well be minimized or excused. *Meyers v. Bd. of Educ. of San Juan School Dist.*, 905 F.Supp. 1544 (D.Utah 1995).

IV. Conclusion

Statutory and case law makes it readily apparent that elementary and secondary students, regardless of classification, are entitled to a free and appropriate education. The primary issue becomes who is financially responsible for affording the appropriate educational services to these students. Unfortunately, given the political and financial constraints placed upon school districts, these issues will continue to be litigated.

SCHOOLS AND LEP STUDENTS: THE LAW AND THE PRACTICE

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Today we often forget that the United States was "the Great Experiment". Founded on enlightenment principles the United States, from the start of its existence, sought a working compromise between individual liberty and a social contract/participative form of government that would ensure social stability. Conflicting traditions and ideologies emerged from these often contradictory set of ideas. Tolerance, opportunity and free expression have frequently been pitted against nationalism, conformity and political/economic/social stability. As the United States evolved the nation continued to struggle with the points of conflict as contradictions arose. One of those points of conflict is the absence of historically shared cultural values and practices. One subset of that conflict is the use of the English language in the United States. This paper will examine the historical and current practices of public schools in regard to non-native speakers of English and the laws that have and have not shaped those practices. The paper will also consider the effects of both schooling practice and the laws on immigrant children and the schools themselves.

The United States has had linguistic diversity from inception. Eighteen non-Native American languages reportedly were spoken on Manhattan Island when the English took possession of New Netherlands (which became New York) in 1664. At the birth of the United States the "Articles of Confederation" were printed in English and German. At least 4 European languages (Dutch, French, German and Spanish) were widely used in daily life as were several Native American languages and Swedish and Polish to lesser extents in various parts of the new country. (Crawford, 1991; Andersson & Boyer, 1978) While linguistic diversity flourished in the new country, from those earliest days, the belief that English should be the language of use in the new nation was espoused by many leaders. In a nation of immigrants (and I do not dismiss the Native American experience, just acknowledge the U.S. government's historical dismissal thereof) common language was considered to be essential.

Thus the conflict between a sustainable, common society and the cultural practices within diverse communities existed from the start of the United States. As early as 1685, a disgruntled citizen of New York City observed, "Our chiefest unhappiness here is too great a mixture of nations" (quoted in Still, 1956, p. 21). The conflict was recognized openly in the colony of Pennsylvania which had a "Society for promoting religious Knowledge and the English Language among the German Emigrants in

Pennsylvania". Writing to that society in 1756 the Pennsylvania Trustees of the German Society (including Benjamin Franklin) wrote that they shared the common

> aim . . . not to proselyte the Germans to any particular Denomination, but (leaving all of them to the entire Liberty of their own Judgments in speculative and disputed Points) to spread the knowledge of the avowed uncontroverted Principles of Religion and Morality among them, to render them acquainted with the English Language and Constitution, [and] to form them into good Subjects. . ." (quoted in Cohen, 1974, Vol. 1, p. 637)

The desire of the English to create one society obedient to the crown translated into the use of American English as a means to build nationalism in the new country. Use of standard English and the creation of a sense of nationality were goals of early U.S. leaders as they attempted to unify diverse peoples, to differentiate the new nation from Britain and to build loyalty to a fledgling government. Still, bilingualism was a fact in many parts of the new United States. Some early government documents were published in German and French as well as English and in 1795 the U.S. Congress voted on a proposal to print all federal laws in German. The bill failed by one vote but occasionally some government publications were still printed in both German and English. In addition, Congress declined to adopt an official language and there was no official policy about speech. (Crawford, 1991) There was no strong national consensus about use of languages other than English throughout much of the nineteenth century.

Consequently for much of the nineteenth century local language practice prevailed. Since this is the time period in which public school systems began to emerge in the United States school practices varied by locality. Use of the vernacular, whatever that was locally, was common throughout the country. Public school instruction was delivered in German, Spanish in certain parts of the country and still more private schools delivered instruction in German, French, Scandinavian or Dutch in specific regions until the end of the nineteenth century. German language newspapers were also common in communities with large numbers of German immigrants. About a dozen cities had bilingual education programs prior to WWI. Baltimore, Cincinnati, Cleveland, Indianapolis, Milwaukee and St. Louis had German-English schools and it is estimated that roughly a million school children received instruction in both English and German. Louisiana had public and private French-English schooling and New Mexico had state sanctioned Spanish-English bilingual education. In addition Pennsylvania, Colorado, Illinois, Iowa, Kentucky, Minnesota, Missouri, Nebraska and Oregon had state laws that permitted bilingual education (Andersson & Boyer 1978; Crawford, 1991).

However, at the turn of the twentieth century several factors converged that allowed a simmering conflict over bilingualism and biculturalism to boil over. The first factor was immigration, which both increased and changed in pattern at the end of the 19th and beginning of the 20th centuries. The second factor was the change in U.S. society wrought by the switch from an agrarian/rural economy/society to a urban/industrial economy/society. Third was a growing public sentiment that supported isolationism and preservation of "American" culture which culminated in World War I.

In the 70 years from 1820 to 1890 approximately 15 million voluntary, legal immigrants arrived in the United States with 95% of these being from north and west Europe, primarily France, Germany, and the British Isles. In the 30 years between 1890 and 1920 18.4 million voluntary, legal immigrants arrived in the United States with 63.5% of these immigrants coming from south and east Europe and 10.8% coming from 'other' parts of the world such as Asia and Latin America. (U.S. Census Bureau, 1999; Hall, 1997; Stewart, 1993) (These figures do not include Africans who were brought to the United States for the purposes of slavery or Mexican Americans who were forcibly patriated by land acquisition.)

There had been opposition to immigrants before 1890 (persecution of Irish and Germans in the 1840's and 1850's) which had cultural elements to them (religious differences, fear of different political beliefs) but which generally did not include language as a cause for concern amongst the American people. During the 1880's that changed and use of language other than English in the U.S. started to be viewed negatively. Language, among other factors such as religion, ethnicity and race, became a convenient way to categorize people and to label some people as suspect, inferior, or undesirable. English only laws began to pass in the Midwest to stop bilingual education (primarily in German) and nativist policies in other states resulted in segregated schooling or no schooling for native speakers of languages that had never gained a toehold in the public school system (Asians, Hispanics in California and the Southwest). (Spring, 1997; Crawford, 1991)

The "differences" and large numbers of these "new" immigrants at the turn of the century combined with the steady transition of the United States from an agrarian/rural to an industrial/urban economy/society to result in a national policy of Americanization which included English only as practice if not law. The transition to an industrial/urban society meant that more different people were now living together in larger, but crowded areas. In 1900 40% of U.S. people were living in urban areas, by 1920 that number had risen to 51% of the population and the number continued to increase throughout the century until 1970 when a full 75% of the population lived in urban areas, the approximate percentage of people in urban areas today. In addition those urban areas were growing in land size and use. (U.S. Census Bureau, 1995; Maizel, White, Root, Gage, Stitt, Osborne, & Muehlbach, 2000) More people were living together on smaller pieces of land and those people were more different from each other than anytime, any place in history. Accession to local custom in rural communities could still occur in those communities but these communities were declining in size and number and were not where the increasing majority of the U.S. population lived. Diversity became apparent and was not valued in the turn of the 20th century United States.

Public sentiment of the times was expressed openly and frequently by Theodore Roosevelt before, during and after his term as President of the country saying things such as, "There can be no fifty-fifty Americanism in this country. There is room here only for 100% Americanism, only for those who are Americans and nothing else." (Republican Party Convention speech, 7/19/18 quoted at Bartleby.com, 2001). And in regard to language use,

> An immigrant who comes here should be required within five years to learn English or leave the country. (4/27/18 in the Kansas City Star quoted at Bartleby.com, 2001)
>
> We have room for but one language in this country and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house. (quoted in Crawford, 1991, p. 23)

Beliefs such as these were widespread during the early 20th century in the United States and in society and in the schools they resulted in full blown assimilationist policies and practices. World War I intensified hatred against Germans in the United States in particular and resulted in language restriction laws in several states. The study of German language was removed from school curricula across the country and prejudice against other languages soon followed. Ohio and Nebraska forbid any kind of foreign language instruction. According to Crawford, by 1920 thirty-four states had mandated school instruction in English but "At the national level, a bill to designate English 'as the language of instruction in all schools . . .' failed to pass the 66th Congress" (1991, p. 30) during the 1919-1920 legislative session. These laws were consistent with the English-only instruction for Native Americans that had been the policy of the Bureau of Indian Affairs since the mid-1800's.

There was a backlash to these restrictive language laws and practices. The 9th Circuit Court of Appeals consistently stopped the prohibition of teaching non-English languages in their jurisdiction in the 1920's and Spanish speakers in New Mexico opposed English-only school and government policies there. (Ricento, 1996) Then in 1923 the legality of such school language prohibitions was challenged in a case that reached the U.S. Supreme court, Meyer v. Nebraska. The Nebraska law challenged in this case forbid any foreign language instruction to students who had not completed eighth grade (in any school, private or public). Meyer was a teacher who had been observed teaching in German in an elementary school in defiance of the law. Although the Supreme Court was sensitive to the purpose of the Nebraska law saying,

> The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety.

However the Court was ultimately forced to find

> The desire of the legislature to foster a homogeneous people with American Ideals prepared . . . to understand . . . discussions of civic matters is easy to appreciate. . . . But the means adopted . . . exceed the limitations upon the power of the State and conflict with rights. . .
>
> The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. . . . Meyer v. Nebraska, 22 U.S. 390 (1923).

Reversing the lower court decision and finding the Nebraska law unconstitutional. Although Meyer was constructed somewhat narrowly, it protected the freedom of private schools to construct their curricula as they saw fit and laid the groundwork for protection of cultural customs in the U.S.

The Court's decision in Meyer was followed by civil activism to protect and promote bilingualism and biculturalism in the United States. Puerto Ricans, under colonial rule and forced to attend English-only public schools in their own state, consistently protested and resisted English-only instruction. Native Americans also resisted English-only instruction and the Bureau of Indian Affairs slowly ended the official English only policy following publication of the Meriam Report in 1928. Middle class Hispanics organized into the League of United Latin American Citizens (LULAC) in 1929 with the stated purpose of promoting biculturalism.

> LULAC adopted a code that reflected the desire of middle-class Mexican Americans to integrate the culture of Mexido with that of the United States. The code attempted to balance a respect for U.S. citizenship with a maintenance of cultural traditions. On the one hand, the code asked members to 'Respect your citizenship, converse it; honor your country, maintain its traditions in the minds of your children, incorporate yourself in the culture and civilization.' On the other hand, the code told its members to 'Love the men of your race, take pride in your origins and keep it immaculate; respect your glorious past and help to vindicate your people.' (Spring, 1997, p. 87)

Cuban immigrants in Coral Way, Florida develop a bilingual education model that provides academic instruction in both English and Spanish in order to preserve their own culture, heritage and language while also acquiring English and adopting American culture. Despite these early civil rights and progressive education efforts though, progress toward more culturally diverse school language policies was slow.

English remained the language of instruction in schools for Native Americans and through the 1940's and 50's Native American school children were punished for using their native language in school. Consistent with this practice, the theory of "cultural deprivation" emerged in the 1950's. This theory discounted genetic explanations for school achievement differences among the children of different ethnic groups and suggested instead that environmental and cultural factors accounted for differing school performance.

> 'To make it in America' declared sociologist W. I. Thomas, what these 'culturally inferior' children needed most was to master the language and values of the dominant society. The job of the schools he argued was to 'change their culture,' that is, to overcome students' handicaps of ethnic background and enable them to assimilate. (Crawford, 1991, p. 27)

Ideas that emanated from cultural depravation theory represented a deficiency model. Children from cultures other than the dominant, white Anglo-Saxon Protestant norm, had some deficiency that could be remedied by education. That education primarily took the form of immersion, the practice of putting a non-native speaker of English into a regular classroom and then letting them "sink or swim" – learn English by force of effort for survival or drop-out. English as a Second Language methodology, which attempts to teach the non-native speaker English as quickly as possible while the child still receives academic instruction in English, had been developed in the 1930's but was not used on a widespread basis until the 1970's. A 1968-69 Civil Rights Commission survey found only 5.5% of Hispanic students in the Southwest United States receiving ESL instruction and less than 3% in bilingual education classrooms. Also Hispanic children reported getting "Spanish detention" for using their native language in school. Thus English-only instructional dominance persisted in the U.S. public school curriculum through the 1970's. The undisguised purpose of this practice was to replace native languages other than English with that dominant tongue.

However, non-native speakers of English did not succumb to cultural domination. Slowly but surely cultural activists achieved recognition of their rights as citizens and the law FINALLY started to protect those rights in the 1960's. First came Title VI of the Civil Rights Act of 1964 which said:

> No person in the United States shall, on the ground of race, color or **national origin**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial aid. (42 U.S.C. Section 2000d-1)

This law clearly applied to K-16 educational institutions which received federal funds (most all of them). Still there were few immediate educational results. Spanish speaking student drop-out rates remained high through 1960's-70's indicating discouraging instructional practices were still in place. Also, intelligence testing in English during the 1960's and 70's resulted in statistically high placement of non-native English speakers in special education classes with those students being labeled as EMR (emotionally mentally retarded). The culturally deficient model persisted.

Additional progress for non-native English speakers came in 1968 with the passage of the Bilingual Education Act as Title VII of the reauthorization of the 1965 Elementary and Secondary Education Act. The Title VII Bilingual Ed Act provided funds in the form of competitive grants for school districts to serve the needs of low-income Limited English Proficient (LEP) students. LEP students were defined as non-native speakers of English, people from regions where English was not the dominant language and Native Americans (including Native Alaskans). The purpose of the funding was to help the schools to enable LEP students to function fully in U.S. society. However, funding was limited and participation was voluntary through grant application and award and the effect of the initial act was minimal. (See Bilingual Education Act of 1988 (amended 1968 Act) and discussion in Stewner-Manzanares, 1988)

In 1970 the Department of Health, Education and Welfare's Office of Civil Rights issued a one page memo indicating that Title VI of the Civil Rights Act of 1964 and their own departmental regulations mandated that schools "provide equal educational opportunity to national origin minority group children deficient in English language skills and saying that meant:

> Where inability to speak and understand English language excludes national origin-minority group children from effective participation in the educational program . . . the district must take **affirmative**

> **steps to rectify the language deficiency** in order to open its instructional program to these students . . ." (DHEW, 1970)

And defining that to mean that schools must

- Not assign minority students to EMR classes with English testing.
- Not deny minority students access to college prep curriculum.
- Not practice permanent tracking for non-native epeakers.
- Notify minority parents of school activities in their native language.

This administrative regulation was followed by U.S. Supreme Court affirmation of these principles in Lau v. Nichols in 1974 wherein the court found:

> children between the ages of six and 16 years are . . . 'subject to compulsory full-time education.' Under these state imposed standards **there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for student who do not understand English are effectively foreclosed from any meaningful education.** Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful. Lau v. Nichols, 414 U.S. 563 (1974).

The Supreme Court found the California schools in this case in violation of Title VI of the Civil Rights Act of 1964 and concluded that there was "no equality of treatment" and thus, that all students, regardless of their English ability, must not be denied "a meaningful opportunity to participate in the public educational program".

This Supreme Court decision was bolstered by the 1974 Equal Educational Opportunities Act which required school systems to use "appropriate programs" for LEP students which would facilitate "equal participation . . . in its instructional programs." (EEOA, 1974) Unfortunately the act did not define what was "appropriate". The reauthorization of the Bilingual Education Act in 1974 clarified the schools legal obligations somewhat expanding funding for all LEP students, not just low-income students and providing a better definition of the kind of services that needed to be provided to help LEP students to learn. These clarifications were followed by OCR guidelines issued in 1975 which specifically ruled out ESL at the elementary level (but not secondary) endorsing bilingual education variants for elementary LEP student instruction. (Imber & Van Geel, 1993)

Seemingly then in the early 1970's U.S. public schools should have been on the road to providing bilingual education for non-native speakers of English to facilitate their equal education. Unfortunately it was not that simple. As Gary Orfield notes, "Bilingual-bicultural education is like an impressionist painting – very attractive from a distance but unclear and confusing when one gets very close to it." (quoted in Crawford, 1991. 31). The issue of cultural pluralism versus Americanization/dominant culture raised its head with nativist politicians once again objecting to diversity and supporting the need for the use of

English in the schools. Thus through the 1970's what ground had been seemingly gained for bilingual/bicultural education was lost and a return to emphasis on English acquisition in public school programs seemed inevitable.

Throughout the 1980's the battle continued to be waged:

Castaneda v. Pikard (1981)

Fifth Circuit Court of Appeals 648 F.2d 989

- Applied EEOA said that bilingual education programs not discriminatory.
- Title VI requires intentional discrimination, EEOA does not,
- Castaneda II (1986) 5th Circuit:
  - ability grouping and classroom assignment system in bilingual program not discriminatory
  - bilingual education not mandated; EEOA leaves room for districts to select "the programs and techniques" they will use to provide LEP students with equal education.
- "Castenada standards"
  1. Is district's program based on sound educational theory/practice?
  2. Does the district carry it out appropriately with training, materials, etc.?
  3. Must evaluate effectiveness of program and change if not producing results

Plyler v. Doe (1982)

457 U.S. 202

- Illegal alien minors have right to free public education under 14th amendment (students not responsible for their situation)
- Public schools can't
- deny admission to resident student regardless of status and
- can't treat student, parents or guardian in disparate manner to determine residency or
- require parents or students to document immigration status or
- require social security numbers from all students or
- make inquiries which may expose undocumented status.

1985 DOE OCR Guidance Document

- Adopted Castenada standards.

1991 DOE OCR Policy Update

9/27/91 (8 page memo)

- For use in conducting "Lau" compliance reviews under Title IV for **K-12. Have to provide equal educational opportunity.**

"Most court decisions in this area stop short of providing OCR and recipient institutions with specific guidance."

- No particular program of instruction for LEP students but adopts "Castenada" Standards AND
- Must implement a specific program with procedures for:

Identification

Assessment

Provision of Alternative Language Services to all language-minority students who need such services.

- **Standards for equal access** to educational program:

1. LEP students perform as well as non-LEP peers
2. LEP students participate in total school curriculum
3. Drop-out/retention rates no higher than non-LEP peers.

- Standards for staffing, "may not relegate LEP students to second class status":
  - When state has qualifications for LEP program teachers district must hire qualified teachers or those working toward them.
  - State qualifications or not at a minimum:
    - IF a bilingual program for LEP students "teachers should be able to speak, read and write both languages and" have knowledge of bilingual ed. methods.
    - IF ESL or structure immersion teachers must have been adequately trained in these methods (in-service, course work or combination).
    - Must validate teacher qualifications with appropriate test.
    - ESL teachers need not be bilingual if effective.
    - If use bilingual aides must show that have defined appropriate skill level in both languages and have assessed that aides possess those skills.
    - If qualified teachers unavailable must train those teachers you do have including interim training.
- Must have adequate, appropriate materials.
- Specific Exit Criteria for Language Minority LEP students
  - Once students placed in alternative language program must get services until proficient in English to level able "to participate meaningfully in the regular educational program." Determined by equal access standards.
  - Exit abilities must be assessed with standardized test and appropriate, objective criteria.
- Special Education
- Reiterated 5/70 memo that English tests cannot determine placement in special education programs for LEP students. These would violate Section 504 of the Rehabilitation Act of 1973 which says that tests must be "selected and administered so that test results accurately reflect a student's special education needs".
- Also, can't deny special education services to LEP students who qualify and who are already receiving LEP services – no "no double services" policies.

- Cannot categorically exclude LEP students from gifted/talented or other special programs. Can only exclude for same reasons as others or if (a) time in program would detract from language program and (b) the program "requires proficienty in English" "for meaningful participation".
- Program must be periodically and objectively evaluated and modified if not working.
- Parents must be notified in language appropriate to parents.

Proposition 227 – California – 1998

- Decline of 29% to 12% ELP students in bilingual programs.
- Waivers being widely used in some districts not in others.

Proposition 203 – Arizona - 2000

Requires that all public school instruction be conducted in English. Children not fluent in English shall normally be placed in an intensive one-year English immersion program to teach them the language as quickly as possible while also learning academic subjects. Parents may request a waiver of these requirements for children who already know English, are ten years or older, or have special needs best suited to a different educational approach. Normal foreign language programs are completely unaffected. Enforcement lawsuits by parents and guardians are permitted. (Summary from: Arizona Secretary of State's website: http://www.sosaz.com/election/2000/info/pubpamphlet/prop1-I-2000.htm)

Massachusetts, Oregon, Rhode Island have similar initiatives in 2001. Colorado expected to in 2002.

Executive Order 13096: American Indian and Alaska Native Education
Reauthorization of the Elementary and Secondary Education Act (ESEA)

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Title IX of the 1972 Educational Amendments. 20 U.S.C. Section 1681.

Title VI of the 1964 Civil Rights Act. 42 U.S.C. Section 2000d-1.

Equal Education Opportunity Act of 1974. 20 U.S.C. { 1703(f)(1988).

Court Decisions

Meyer v. Nebraska, 22 U.S. 390 (1923).

Lau v. Nichols, 414 U.S. 563 (1974).

DISCIPLINING SPECIAL EDUCATION AND SECTION 504 STUDENTS: RESIDENTIAL PLACEMENT OF JUVENILE OFFENDERS

Disciplining Special Education and Section 504 Students

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Juvenile Offenders, Residential Placement and Special Education

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EDUCATION LAW ASSOCIATION
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JUVENILE OFFENDERS, RESIDENTIAL PLACEMENT AND SPECIAL EDUCATION*

In recent years there has been a considerable amount of discussion as to where the responsibility of school districts under the Individuals with Disabilities Education Act (IDEA)[1] begins and ends with respect to juvenile offenders. With more frequency, juvenile courts are seeking to bring school districts into cases involving juvenile offenders who have psychiatric problems or some form of mental illness. Juvenile courts are seeking to join school districts in juvenile court cases to determine whether these juvenile offenders are entitled to residential placements under the IDEA.

This presentation will discuss this recent phenomenon and will attempt to distinguish between residential placement for educational purposes under the IDEA and residential treatment for rehabilitation or mental health purposes. This presentation will also discuss whether juvenile courts have the jurisdiction to order school districts to provide residential placements to juvenile offenders.

DEFINITION OF A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA defines "free appropriate public education" as special education and related services provided at public expense, under public supervision and direction, without charge, which meet the standards of the state education agency and include an appropriate preschool, elementary or secondary school education provided in conformity with the individualized education program (IEP).[2]

In Board of Education v. Rowley,[3] the United States Supreme Court held that the Education of the Handicapped Act's [now IDEA] requirement of a "free appropriate public education" is satisfied when the state provides personalized instruction with sufficient support services that permits the disabled child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate grade levels used in the state's regular education program and must comport with the child's IEP as formulated in accordance with the Act's requirements. The United States Supreme Court summarized its view of the term "free appropriate education" by stating:

> "When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a state is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support

> services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[4]

The United States Supreme Court rejected the argument that school districts were required to provide the best possible education to disabled children under the IDEA.

ELIGIBILITY FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE IDEA

Not all students who might be considered disabled under Section 504 of the Rehabilitation Act are eligible under the IDEA for special education and related services. The IDEA contains a more narrow definition of a child with a disability.[5]

The federal regulations,[6] define a child with a disability, as follows:

> "As used in this part, the term 'child with a disability' means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, and other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

Serious emotional disturbance or emotional disturbance is defined in the federal regulations,[7] as follows:

> "Emotional disturbance is defined as follows:

> (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance.
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance."

The federal regulations specifically state that children who are socially maladjusted are not eligible for special education unless it is determined that they also have an independent emotional disturbance. Many juvenile offenders are social maladjusted but do not also have an emotional disturbance.

In Springer v. Fairfax County School Board,[8] the Court of Appeals held that juvenile offenders who are socially maladjusted are not eligible under the IDEA for special education and related services unless they have an independent serious emotional disturbance.

In Springer, the student had progressed successfully from grade to grade in regular education programs through the tenth grade. In the eleventh grade, the student was arrested for possessing burglary tools and tampering with an automobile and received one year probation, fifty hours of community service and a fine. During his eleventh grade year, Edward Springer would frequently sneak out of his parents' house and stay out all night with friends. He stole from his parents and others. He regularly used marijuana and alcohol. He often broke school rules and had a high rate of absenteeism. He was disciplined for driving recklessly on school property, cutting classes, forgery, leaving school grounds without permission and fighting. Toward the end of his eleventh grade year, Edward and his friends stole a fellow student's car. Edward kept the car for a week of joy riding and was sentenced to probation until his eighteenth birthday.[9]

During this time, Edward continued to scored in the average to superior range of intellectual ability on standardized tests. However, Edward's eleventh grade educational performance suffered because he cut class and frequently failed to complete assignments. During his week of joy riding, he skipped school and missed his final exams causing him to fail three of this seven courses for the year. Edward's teachers and his mother agreed that these difficulties resulted from truancy, lack of motivation and poor studying habits.[10]

In response to his behavioral problems, Edward's parents enrolled him in a private residential school. Edward's parents then requested that the school district fund this placement, claiming that Edward was seriously emotionally disturbed. Edward was evaluated by the school district which determined that his behavior indicated a conduct disorder that did not qualify as a serious emotional disturbance and ruled that Edward was ineligible for special education services and tuition reimbursement.[11]

The Springers then requested a due process hearing. The local hearing officer ruled in favor of the parents and held that Edward was seriously emotionally disturbed. The school district appealed to the state review officer who reversed the local hearing officer and found that Edward did not meet the criteria for seriously emotionally disturbed students. The state review officer pointed out that several separate evaluations of Edward uniformly supported the conclusion that Edward was socially maladjusted and had a conduct disorder and exhibited no symptoms of a serious emotional disturbance. The federal district court affirmed the decision of the state hearing officer and the parents appealed.[12]

The Court of Appeals reviewed the definition of serious emotional disturbance in the federal regulations and noted that the definition expressly excludes students whose behavior is attributable to social maladjustment unless they also suffer from an independent serious emotional disturbance. The Court of Appeals reviewed the reports of three separate psychologists who uniformly found that Edward was socially maladjusted, suffered from a conduct disorder and not a serious emotional disturbance. The Court of Appeals noted that there was no statutory definition of social maladjustment and accepted the definition of the psychologist who examined Edward who defined social maladjustment as "continued misbehavior outside acceptable norms, a persistent pattern of violating societal norms, involving truancy, substance abuse, a perpetual struggle with authority, easily frustrated, impulsive and manipulative." Another psychologist defined social maladjustment as a disregard for social demands or expectations and a pattern of violating societal norms often associated with drinking, smoking, use of illegal substances and reckless and risk taking acts. The Court of Appeals found that a conduct disorder is often associated with socially maladjusted behaviors and that a conduct disorder is consistent with social maladjustment.[13] The Court of Appeals noted that in A.E. v. Independent School District No. 25,[14] the Court of Appeals found that the fact that a child is socially maladjusted is not by itself conclusive evidence that he or she is emotionally disturbed.[15]

The Court of Appeals in Springer went on to note that the IDEA specifically excludes socially maladjusted behavior from the definition of serious emotional disturbance and that the exclusion makes perfect sense when considering the population targeted by the IDEA. The Court of Appeals noted that teenagers often go through a time of social maladjustment and if all "bad conduct" and socially maladjusted behavior was included under the definition of serious emotional disturbance, the number of students who would qualify for special education services would increase exponentially and would substantially enlarge the burden the IDEA places on state and local authorities. The Court of Appeals noted that such a definition would require the schools to dispense criminal justice rather than special education and that it was not the duty of special education to force socially maladjusted children to attend school by residentially placing them if they choose to remain truant. The Court of Appeals noted that it was the responsibility of the juvenile justice system to address the problems associated with social maladjustment and conduct disorders.[16]

The Court of Appeals in Springer did not address the issue of whether a juvenile offender who has a conduct disorder and is socially maladjusted, who also has an independent learning disability which qualifies the student for special education, is entitled to a residential placement.

In Capistrano Unified School District v. Wartenberg,[17] the Court of Appeals held that once a child qualifies for special education regardless of the reason, the school district must look at the entire child and his or her behavior. In Wartenberg, the Court of Appeals noted that if Jeremy Wartenberg's failure at school resulted from a conduct disorder, then he would not be entitled to residential placement or private school placement.[18] However, once it is determined that a child suffers from a covered learning disability, the child is entitled to a free appropriate public education and the school district must provide a program that will allow the child to benefit. The court held that where a child's learning problems are caused partly by covered learning disabilities and partly by a non-covered conduct disorder, the child was entitled to a private school placement.

In dissent, Judge Ferguson stated that in his opinion, Jeremy's need for private school placement was predominately caused by the conduct disorder which was not a disability under the IDEA and, therefore, the school district should not be required to pay for a private school or residential placement. Judge Ferguson stated that there should be a direct nexus between a child's qualified disability and the need for a private school or residential placement. Judge Ferguson stated:

> "Jeremy's scholastic failure, however, was the direct result of volitional behavior. School districts bear the responsibility of educating disabled students; they do not bear the responsibility of parenting anti-social students."[19]

The decision in *Wartenberg* would allow many juvenile offenders with learning disabilities to request residential placements under the IDEA. The *Wartenberg* decision appears to conflict with another Ninth Circuit decision - *Clovis Unified School District* - discussed below; which held that residential placements under the IDEA must be for educational purposes.

RELATED SERVICES UNDER THE IDEA

Under federal law, the term "related services" means transportation and such developmental, corrective, and other supportive services, including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work, counseling and medical services, except that such medical services shall be for diagnostic and evaluation purposes only, as may be required to assist a child with a disability to benefit from special education.[20] The federal regulations contain a similar definition of related services.[21]

Psychological services or counseling services are provided under the IDEA in order to assist the child to benefit from special education (i.e., to allow the child to progress from grade to grade and receive passing marks).

In *Irving Independent School District v. Tatro*,[22] the United States Supreme Court addressed the meaning of related services under the IDEA. The Court noted that Congress did not intend to require school districts to provide medical services that might be unduly expensive or beyond their range of competence. However, children with serious medical needs are still entitled to an education and school districts are required to provide instruction in hospitals and at home.

The Court stated:

> "To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. *First, to be entitled to related services, a child must be handicapped so as to require special education*. See 20 U.S.C. section 1401(1); 34 C.F.R. section 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an

> obligation under the Act. See 34 C.F.R. section 300.14, Comment (1) (1983).
>
> Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless of how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it."[23] [Emphasis added]

PLACEMENT IN A PSYCHIATRIC HOSPITAL OR RESIDENTIAL FACILITY

Placement in a residential treatment facility that will provide the services of a psychiatrist and a psychologist to treat John Smith's substance abuse problems and his sexual abuse problems are outside the scope of the IDEA. Although the term "residential treatment facility" is used, the services sought are indistinguishable from that of a private psychiatric hospital.

In Clovis Unified School District v. Office of Administrative Hearings,[24] the Court of Appeals held that school districts are not required to pay for hospitalization of special education students in private psychiatric hospitals. The court held that such services are excluded "medical services." The court stated:

> "Despite the Shoreys' arguments, we see no reason why the 'licensed physician' distinction should take on special significance in cases, such as this, which involve intensive psychological rather than physiological disability. A child hospitalized for ear surgery or kidney dialysis who, the Shoreys concede, is not entitled to subsidy of the costs of hospitalization, frequently must receive care by other than licensed physicians. The services of hospital nurses, dieticians, physical therapists, orderlies and other aides constitute integrated medical services in the treatment of a physical illness requiring the 'medical' intervention of licensed professionals. Clearly all such services, including the strictly medical or surgical services themselves, 'support' a child's education. But it would do havoc to the structure of the Act to exclude only the services of licensed physicians in such circumstances, and to require the school district to pay for all other services.

> At oral argument, the Shoreys conceded that the services of the aforementioned hospital personnel are excluded as medical, not because they are provided by doctors (because they are not), but rather because their institutional efforts are involved in the curing of a physical illness.
>
> We cannot accept as reasonable a definition of 'medical' which ultimately turns on the distinction between physiological illness and mental illness. Such a definition would mandate huge expenditures by local school boards aimed at 'curing' psychiatric illness but not require similar expenditures for treating children with physical problems who require the more traditional 'medical' services.[25] [Emphasis Added]

SCOPE OF RESIDENTIAL PLACEMENT

A juvenile offender who needs a residential treatment program targeted at dealing specifically with delinquent behavior (e.g., drug offenses, violent behavior, sex offenses) is not seeking a free appropriate public education under the IDEA.

A residential treatment center for sex offenders, for example, would require a psychiatrist to monitor a juvenile's medication and staff to support the psychiatrist in prescribing treatment. The court appointed psychologist's recommendations would be based on the treatment of the juvenile's mental illness. The goal of the treatment would be rehabilitation (i.e., the cessation of the criminal conduct).

The IDEA and federal regulations require school districts to pay for residential placements, if such placements are necessary for the children with disabilities to benefit from special education.[26] The school district is liable for the cost of the program "...including non-medical care and room and board." [27] [Emphasis added]

Where the primary reason for the child's placement is medical, not educational, school districts are not liable.[28]

In Clovis Unified School District, the court stated:

> "Michelle was hospitalized primarily for medical, i.e. psychiatric, reasons, and therefore the District Court erred when it determined hospitalization to be a 'related service' for which Clovis was responsible under the Act.
>
> The psychotherapeutic services Michelle received at King's View may be qualitatively similar to those she would receive at a residential placement, and it is clear that some psychological services are explicitly included within the definition of related services under the Act when pupils need such services to benefit from their special instruction. However, the intensity of Michelle's program indicates that the services she received were focused upon treating an underlying medical crisis. Where, as here, a child requires six hours per day of intensive psychotherapy, such services would appear 'medical' in that they address a medical crisis.
>
> Furthermore, King's View hardly provided Michelle with any educational services. Rather, the local school district sent both regular and special education teachers to King's View to meet the educational needs of Michelle and other children who were patients there. Because King's View does not provide its patients with educational services, it differs substantially from facilities found by other circuits to be residential placements within the ambit of 34 C.F.R. section 300.302 for which school districts are financially responsible...."[29]

A PROGRAM TO CURE DRUG ADDICTION OR SEXUAL AGGRESSION IS NOT A RELATED SERVICE

In Field v. Haddenfield Board of Education,[30] the federal district court held that an emotionally disturbed student's placement in a substance abuse program after he was expelled by the school district in which he was placed after being found in possession of Valium and admitting to drinking and smoking marijuana was not a related service under the IDEA, but rather was a medical service, the payment of which was the responsibility of the student's parents.

The court held that even though a child's education is adversely affected by substance abuse and successful completion of a substance abuse program can be expected to increase the effectiveness of the child's educational program, it is not a related service under the IDEA. The court held that the fact that a particular substance abuse program may benefit a child's special education program, does not compel the conclusion that the program is a related service.[31]

The court held that a substance abuse program clearly aimed at curing an illness, whether mental or physical, does not become instantly related when it can be implemented by persons other than licensed physicians.[32] The court held that the student's need for treatment of substance abuse, which included evaluation by a psychiatrist and medication, was segregable from the student's educational needs. The court held that the school district would be responsible for the educational program at the residential treatment facility and that parents would be responsible for the remainder of the cost.[33]

LOCKED FACILITIES ARE OUTSIDE THE SCOPE OF THE IDEA

In general, residential placements under the IDEA are unlocked and have as their primary purpose, the education of the student. If a student requires a locked facility then an order of the juvenile court, due to violation of a criminal statute, or an order of the state trial court, under the state civil commitment statutes, should be issued.

In O'Connor v. Donaldson,[34] the United States Supreme Court held that a state under the United States Constitution cannot confine an individual who is not dangerous and who can live safely in society alone or with the help of family members or friends. In Addington v. Texas,[35] the court held that to meet the due process requirements of the Fourteenth Amendment, the evidentiary standard for use in civil commitment hearings must be greater than the preponderance of evidence standard applicable to cases under the IDEA. Thus, when a hearing officer or court orders a school district to pay for the hospitalization of a disabled student in a psychiatric hospital, basing the judgment on a preponderance of evidence standard, the hearing officer may be in violation of the court's holding in Addington v. Texas.[36] The court in Addington stated:

> "This court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection...Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether

> we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.
>
> The state has a legitimate interest...in providing care to its citizens who are unable because of emotional disorders to care for themselves...Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear as to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."[37]

The Court in Addington went on to state that the standards for civil commitment may vary from state to state and held that the procedures must be allowed to vary, as long as they meet the constitutional minimum. In California, the standard of proof in a civil commitment hearing is beyond a reasonable doubt, the standard used in criminal proceedings.[38]

The juvenile court has the authority to incarcerate a minor who has committed a criminal offense. A hearing officer under the IDEA does not.

DUTIES AND RESPONSIBILITIES OF THE JUVENILE COURT

In California, a juvenile court judge may join other agencies in the juvenile court proceedings when the court believes that the other agencies may have failed to meet a legal obligation to provide services to the minor.[39] However, the juvenile court ". . . has no authority to order services unless it has been determined through the administrative process of agency . . . that the minor is eligible for those services."[40]

Under California law, a juvenile court may place a juvenile offender in a suitable licensed community care facility for counseling or other treatment services.[41] California law authorizes a juvenile court to order that the probation officer obtain the services of psychiatrists, psychologists, physicians and surgeons and other clinical experts as may be required to assist in determining the appropriate treatment of the minor and as may be required in the conduct or implementation of the treatment. Payment for the services is a charge against the county.[42]

The IDEA does not directly address the issue of juvenile court jurisdiction. Rather the IDEA sets forth an administrative process which includes an administrative hearing whenever there is a dispute between the parent and the school district.[43] An appeal of the administrative decision may be made to a court of competent jurisdiction. [44] In most cases, the court will review the administrative proceedings and in some cases, allow additional evidence but, generally, the courts will defer to the expertise of the hearing officer and will overturn the hearing officer's decision only if the decision is not based on a preponderance of the evidence.[45] Under the Supremacy Clause of the U.S. Constitution, this comprehensive federal scheme should supersede any state law to the contrary, and, therefore, deprive the juvenile court of jurisdiction to order a residential placement.[46] The California statute recognizes the juvenile court's lack of jurisdiction.

CONCLUSION

As set forth in Rowley, the purpose of the IDEA is to provide qualified disabled students a free appropriate public education that will allow the student to progress from grade to grade. To be eligible for special education, a student must qualify under the narrow definition of disabled under the IDEA. The IDEA definition of disabled is narrower than the definition of disabled under Section 504 of the Rehabilitation Act and specifically excludes students who have a conduct disorder and are socially maladjusted and do not have an independent qualified disability. Where the student is socially maladjusted and also has an independent disability (e.g. learning disability or serious emotional disturbance), the student may be entitled to a private school or residential placement.

The definition of related services under the IDEA does not include drug abuse treatment or treatment of mental illness (e.g. sexual addiction). Residential placements under the IDEA are for educational purposes not for treatment of medical illness and are generally in unlocked while juvenile courts may incarcerate juvenile offenders in locked facilities. Also, the IDEA contains the exclusive process for disputing educational decisions relating to educational placements.

From the cases discussed above, it appears to be clear that a juvenile court may not order a school district to residentially place a juvenile offender such as John Smith in a residential treatment center to cure his mental illness. Residential placements under the IDEA are for the purpose of providing special education students with a free appropriate public education that will allow the student to benefit educationally. Residential placements under the IDEA are not provided to students for the purpose of curing a mental illness or to rehabilitate juvenile offenders.

Expanding the coverage of the IDEA to juvenile offenders who need expensive residential treatment would dilute existing programs under the IDEA and dramatically increase the cost of special education programs. School districts would be forced to transfer even more money from regular education programs which would cause damage to existing regular education programs. Hopefully, juvenile courts will come to understand the limited coverage of the IDEA and will fund needed treatment for juvenile offenders.

* The materials for this presentation are based on an article by Ronald D. Wenkart in West's Education Law Reporter, "Juvenile Offenders, Residential Placement and Special Education," 144 Ed.Law Rep.1 (2000)

1. 20 U.S.C. Sections 1400 et seq.
2. 20 U.S.C. section 1401(18).
3. 102 S.Ct. 3034, 3049-51 (1982)
4. Id. at 3049.
5. 20 U.S.C. Section 1401(3).
6. 34 C.F.R. Section 300.7(a)(1).
7. 34 C.F.R. Section 300.7(c)(4)
8. 134 F.3d 659, 123 Ed.Law Rptr. 478 (4th Cir. 1998).
9. Id. at 661.
10. Id. at 661.
11. Id. at 661-62.
12. Id. at 662.
13. Id. at 664.
14. 936 F.2d 472, 476 (10th Cir. 1991).
15. Springer v. Fairfax County School Board, 134 F.3d 659, 664 (4th Cir. 1998).
16. Id. at 664.
17. 59 F.3d 884, 101 Ed. Law Rptr. 640 (9th Cir. 1995)
18. Id. at 892.
19. Id. at 901-902.
20. 20 U.S.C. section 1401(17).

21. 34 C.F.R. section 300.13.

22. 104 S.Ct. 3371, 18 Ed.Law Rptr. 138 (1984).

23. Id. at 3378-79.

24. 903 F.2d 635, 60 Ed.Law Rptr. 728 (9th Cir. 1990).

25. Id. at 644.

26. 20 U.S.C. sections 1412(2)(B), 1413(a)(4)(B); 34 C.F.R. section 300.302.

27. 34 C.F.R. section 300.302.

28. Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir., 1990).

29. Clovis Unified School District, 903 F.2d at 645-46. [Emphasis added]

30. 769 F.Supp. 1313, 69 Ed.Law Rptr. 724 (D.N.J. 1991).

31. Id. at 1326.

32. Id. at 1327, quoting from Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635, 643 (9th Cir. 1990).

33. Id. at 1328.

34. 422 U.S. 563, 95 S.Ct. 2486 (1975).

35. 441 U.S. 418, 99 S.Ct. 1804 (1979).

36. Ibid.

37. Id. at 1809.

38. Waltz v. Zumwalt, 176 Cal.App.3d 835 (1985); Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981).

39. Welfare and Institutions Code section 727

40. Welfare and Institutions Code section 727(a). See also, Oscar F. v. County of Winchester, 587 N.E. 2d 208 (Mass. 1992).

41. California Welfare and Institutions Code section 727; In Re Ruffel P., 582 N.45 2d. 631 (Fam. Ct. 1992).

42. California Welfare and Institutions Code section 741.

43. 20 U.S.C. section 1415.

44. 20 U.S.C. section 1415.

45. Thomas v. Cincinnati Board of Education, 918 F. 2d 618 (6th Cir. 1990); Livingston School Distict v. Keenan, 82 F.3d 912 (9th Cir. 1996); Capistrano Unified School District v. Wartenberg, 59 F.3d 884 (9th Cir. 1995).

46. United States Constitution, Article VI, Clause 2, "This Constitution and the Laws of the United States which shall be made in pursuance thereof ; . . . shall be the supreme Law of the Land . . ."

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DISCIPLINING SPECIAL EDUCATION & SECTION 504 STUDENTS

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SUMMARY OUTLINE

1. Definition of "suspension"
2. Suspensions for less than 10 consecutive school days
3. Removals for more than 10 consecutive school days
4. Exceptions to "Stay-Put"
5. Continued Services to Suspended or Expelled Students
6. Protections for children not yet found eligible for special education
7. Reporting crimes
8. Functional analysis of behavior & behavioral plans
9. Discipline of Section "504-only" students

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Summary Outline: Disciplining Special Education Students

Change of Placement Beyond 10 Consecutive Days

1. Interim Alternative Educational Setting (IAES) during due process dispute:
    - a. 45 Calendar Days
        - i. School Administrator for [34 CFR 300.520(a)(2)]:
            - (1) Weapons [federal definition 18 USC 930(g)]
            - (2) Drugs (possession, solicits or sells illicit drugs)
        - ii. Hearing Officer - state expedited hearing for:
            - (1) Dangerous Student - "substantially likely to injure self or others"
    - b. Parental Agreement - IEP (not limited to 45 days)
    - c. Court Order - Injunction - for dangerous student (not limited to 45 days)
    - d. Juvenile Justice System (not limited to 45 days)
        - i. For crimes
        - ii. For abused or neglected, truancy
        - iii. Departments of probation, social services, child protection, etc.
2. Long-Term Change in Placement
    - a. Expulsion - S continues receiving special education services in another setting
    - b. Special/alternative schools under county, juvenile or dependent justice system
    - c. Parental Agreement - via IEP - to:
        - i. Continuum of Options:
            - (1) Another school
            - (2) alternative, opportunity school
            - (3) continuation school
            - (4) district community day school
            - (5) non-public school (NPS)
            - (6) residential placement (educational or Mental Health)
            - (7) inter-district or local special education plan area agreement
    - d. Juvenile Court Placement - [see 1(d) above]

COMPLETE OUTLINE

1. **Definition of Suspension:**

   a. State statutes usually define and list suspendable/expellable offenses. Generally it means a temporary removal of a pupil from ongoing educational services for adjustment purposes. However, it does not mean:

      i. Appropriate "interim alternative educational setting" (IAES). [20 USC 1415 (k)(1)(i); 34 CFR 300.520]

      ii. In-school suspensions if:

         iii. The student is afforded the opportunity to continue to appropriately progress in the general curriculum;
         iv. Continue to receive IEP services; and
         v. Continue to participate with nondisabled children to the extent they would in their current placement. [Comments, page 12619]

   b. Removal for portions of school day do count toward the 10 cumulative count if the above factors in section (a) are not afforded the student. [Comments, page 12619]

2. **Suspension of 10 days or less**

   a. Per incident:

      i. limited to no more than 10 consecutive school days to the extent that such alternatives would be applied to children without disabilities [20 USC 1415(k)(1)(A)(i);34 CFR 300.520(a)(1)(i)]
      ii. Student not entitled to FAPE during the suspension of up to 10 consecutive school days. 300.121(d)(1)

   b. Separate incidents during the school year:

      i. If state law allows, student may be suspended for more than 10 cumulative days in a given school year as long as suspensions are not abused (i.e., do not constitute a change of placement). "Change of placement" occurs when a pattern exists due to factors such as:
         (1) length of each of removal;
         (2) total amount of time of removal; and

(3) the proximity of the removals to one another. [300.519(b)]

ii. The Comments make it clear that IDEA does not impose absolute limits on the cumulative number of days that a student may be suspended in a given school year. "It is extremely important to keep in mind that the provisions of the statute and regulation concerning the amount of time a child with a disability can be removed from his or her regular placement for disciplinary reasons are only called into play if the removal constitutes a change of placement and the parent objects to proposed action by school officials (or objects to a refusal by school officials to take an action) and requests a due process hearing. [Comments, page 12414]

Practice Tip: For special education students who are behavioral problems, use suspensions sparingly. Beware of blanket policies such as "Zero Tolerance" where administrators automatically apply punishment without considering parameters of special education laws. Build in options, alternatives to suspensions, in IEP (e.g. behavioral plans). Avoid calling in-school interventions, "suspensions."

3. Removal of more than 10 consecutive school days - Expulsion [1415(k)]

a. **Manifestation Determination**: Before imposing the discipline that applies to regular students beyond 10 school days, the district should (some states require) evaluate special education student and conduct an IEP meeting to determine whether misconduct was a manifestation of the student's disability and whether student's IEP and placement were appropriate, which includes related (DIS) services; supplementary aids and services; and behavioral intervention strategies. MD's must be held in a timely manner, no later than 10 days (very important!). 1415(k)(4)(A)(ii); 300.523

i. General Requirements:

(1) Notice to Parents: no later than the 10th day of district's decision to change student's placement beyond 10 consecutive school days and of all procedural safeguards. [1415(k)(4)(i)-(ii); 300.523(a)(1)] [Compensatory education awarded for district's failure to notify parents of their procedural rights when it assigned their son to an alternative school. *Walker County Board of Education* (SEA AL 2001) 35 IDELR 45]

(2) Time-frame: within the first 10 days of suspension

(3) **Consider**: IEP team must consider in terms of the behavior subject to disciplinary action all relevant information, including:

- (a) a review of all relevant information, including:
- (b) "evaluation & diagnosis"
    - (i) before incident as background
    - (ii) **Practice Tip**: after incident (standardized tests helpful)
- (c) formal and informal information supplied by parents,
- (d) observation and interview of student
- (e) the child's IEP and placement [see *Dallas SD* (SEA OR 1998) 28 IDELR 1225 where MD was judged improper because only academic portion of IEP was considered, not the behavioral portion.]

Practice Tip: Federal law does not specifically require that assessment ("evaluation and diagnostic results") be done after misconduct. The discipline cases (e.g. *Honig v. Doe*) appear to presume that if the student had been receiving FAPE, the behavior would not have occurred thereby casting doubt on the evaluation and IEP that pre-dated the misconduct. Thus, it is safest to conduct some sort of formal assessment after the incident, if practicable, especially if existing assessments are more than 6 months old. However, this raises the question of whether parental consent is required for MD assessments? We know that general consent is required for evaluations [see 1414(a)(1)&(2); 1414(c)(3)] Federal law is silent re assessments for manifestation determinations, but allows state law to determine [1414(a)(1)(C)(ii)]. Some states require "current" assessments.

(4) **Determine** by IEP team: using **"Three-Prong Test"** to determine whether misconduct was a manifestation of, or significantly related to, student's disability? The "Pre-expulsion" or "MD" IEP meeting: must answer "yes" to all three of the following questions [1415(k)(4)(C)(ii); 300.523]:

- (a) Were the IEP and Placement appropriate at the time of the incident and were needed supplementary aids and services, including behavioral plan, provided?

Practice Tip: Don't' make the mistake of thinking that "placement" is merely the location or program. "Placement" in this context really means FAPE. *This is the most difficult test to meet.* This is usually where the expulsion process gets derailed.

(b) Did the student understand the "impact and consequences" of his/her misconduct? [Not the old test of knowing act was wrong.]

(c) Was the student able to control his/her behavior in question? (e.g., impulse control problem) *See Oceanside Unified S.D.* (SEA CA 201) 35 IDELR 27; *Union High School District* (SEA CA 2001) 34 IDELR 303.

ii. include written statements describing information considered and explaining how conclusions were reached [1415(c)]

(1) if parents disagree with the manifestation determination, they may file a due process complaint. "Expedited hearing" will be held to review the district's application of the "three pronged test." 300.525

(2) "Stay put" is triggered when parent files for due process. Student must be returned to last agreed-upon placement during the due process dispute unless [1415(J); 300.526]:

(a) parent agrees to interim alternative educational setting ("IAES");
(b) 45-day IAES ordered by state Hearing Officer [300.526(c)]
(c) 45 day IAES for drugs & weapons [federal definition 18 USC 930(g)].
(d) Honig Injunction" from court granting IAES pending resolution of due process. Not limited to 45 days.

(3) If misconduct is not a manifestation of disability (ie. Answered yes to all 3 questions in pre-expulsion IEP) you may follow your procedures applicable to non-disabled students **but:**

(a) cannot cease all special education services [see 1412(a)(1)(A)].
(b) must transmit all special education and disciplinary records to the expelling governing board or panel. 1415(k)(5)(B)

4. **Exceptions to "Stay-Put":** When a parent disagrees with the district's (1) manifestation determination, or (2) the district's IAES placement, they may file for an expedited hearing, which invokes "stay-put" to keep student in placement at time of incident (per the last agreed-upon and implemented IEP). 1415(k)(6); 300.525 To remove the student from current placement, the district has the following options to override "stay-put":

   a. **School administrators** have the authority to do the following:

      i. Place student in **"Interim Alternative Educational Setting"** (IAES), as follows:

         (1) 10 days or less suspensions: may be placed in an interim setting without IEP;

         (2) Seek parental consent to an IEP for IAES beyond 10 school days (not limited to 45 days). See *Lewiston School Department*, 35 IDELR 58 (SEA ME 2001) where HO ruled that district's IAES offer of 2 hours a day of tutoring off school site with counseling and OT consultation was appropriate temporarily while awaiting placement in day treatment program. *Fairfax Co.Pub.Schs* (SEA VA 2001) 34 IDELR 277; [OSEP 1998 *Letter to Surratt* 30 IDELR 614];

         (3) Up to 45 calendar days (if nondisabled students would be subject to same discipline) in IAES during a due process dispute for the following offenses: [3000.520(a)(2)]

            (a) Weapons: Carries weapon to [or possesses at] school or to school function. "Weapon" defined by federal definition for "dangerous weapon," which means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length. [HO wrongly decided that cigarette lighter with retractable blade was not a "weapon." *Chester Upland S.D.* SEA PA 2001, 35 IDELR 104; Paper clip not weapon. *Anaheim Union High Sch.Dist.* (SEA CA 2000) 32 IDELR 129; Pencil not weapon, *Independent School District #831* SEA MN 1999, 32 IDELR 163 ; Paintball gun not dangerous weapon (SEA MN 1999) *Independent School District No. 279, Osseo Area School* 30 IDELR 645; 18 USC 930; (ED 1995) 23 IDELR 338]; or

(b) Drugs:
  (i) knowingly possess,
  (ii) uses,
  (iii) sells, or
  (iv) solicits to sell illegal drugs [definition of "drugs" 21 USC 812(c); 1415(k)(1)(A)(ii)]

ii. Seek from state or federal court "Honig Injunction/TRO to place in IAES pending due process resolution :"[*School Board of Pinellas County v. J.M.*, 957 F.Supp.1252, 25 IDELR 748 (M.D. Fla. 1997); *Honig v. Doe* 484 US 305, 327 (1988); State HO lacks authority to overturn court's injunction removing student from school SEA CA 2000 *San Ramon Valley Unf.S.D,.* 33 IDELR 21]

iii. Note: Students not yet identified for special education but parent nevertheless seeks due process protections and a request for an evaluation of a student during the 45 IAES placement by either (a) school personnel or (b) hearing officer, student shall remain in placement determined by school administrators pending the results of the evaluation. [See Section 6(c)(vi) below and 1415(k)(8)(C)(ii)]

iv. Report student's crime to state law enforcement or juvenile justice system in accordance with state law not prohibited by IDEA. 300.529; *State of Connecticut v. David F.*, 29 IDELR 376 (Conn.Super.Ct.1998). But, OCR supported parent's charge that school district did not hold manifestation determinations before referring students to the juvenile justice system. District agreed to hold IEP or 504 MD meetings prior to referring students to juvenile justice system except in extreme circumstances, when student poses a threat of serious physical injury. *Hickman County (TN) School District* (OCR 2000) 34 IDELR 294

(1) IDEA does not prohibit law enforcement or juvenile authorities from exercising their responsibilities with regard to the application of Federal and State law.

(2) An agency reporting a crime must transmit copies of the

student's special education and disciplinary records to the agency to whom the referral was made, if permitted by FERPA.

b. **Hearing Officers** may order IAES - in state expedited hearings for dangerous student - "substantially likely to injure self or others" HO will: [1415(k)(2); OSEP 1998 *Letter to Surratt* 30 IDELR 614]

(a) consider appropriateness of current placement;
(b) consider whether the district has made reasonable efforts to minimize the risk of harm in student's current placement, including the use of supplementary aids and services;
(c) determine that IAES enables student to continue to participate in the general curriculum, although in another setting, and to continue those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and
(d) include services and modifications designed to address the behavior involving weapons or drugs so that it does not recur.

c. "Interim Alternative Education Settings" (IAES) are temporary placements beyond 10 consecutive days during a due process dispute of an expulsion proceeding. The district's IAES placement for weapons & drugs may not exceed 45 days if the parent disagrees to the IAES [1415(k)(7)(A); 300.522. The IAES requires an IEP which enables the student to:

i. "Participate" [1415(k)(3)B)(i)] or "progress" [300.522(b)(1)] in the general curriculum, although in another setting;
ii. Continue to receive those services and modifications described in the current IEP; and
iii. Receive services and modifications designed to address the behavior that precipitated the disciplinary action so that it does not recur [1415(k)(3)(B)] (e.g., functional analyses & P-BIP's).
iv. When a parent requests an expedited hearing to challenge the (a) interim IAES for drugs or weapons or (2) manifestation determination, the child shall remain (stay put) in IAES pending the decision of HO or until the expiration of 45 days, whichever occurs first. But, can extend the 45 days by parent consent. [1415(k)(7)(A)].

d. Development or review of behavioral plan required for disciplinary actions beyond 10 days. [1415(k)(1)(B)

i. If LEA did not not conduct a functional behavioral assessment and implement a behavioral intervention plan before suspension, it must convene IEP meeting to develop assessment plan; or

ii. If student has behavioral plan the IEP team must review the plan and modify it as necessary

e. Notice to Parents: parents must be notified within 10 days of the decision to change a disabled child's placement for more than 10 days, and of all procedural safeguards.

If a parent disagrees with the manifestation determination or any decision regarding disciplinary placement, the parent may request an "expedited due process hearing" for which a decision must be rendered within 45 days. [300.528]

5. Continued Services to Suspended or Expelled Students

a. 1415(a)(1)(A) requires the provision of FAPE to properly (i.e., no manifestation found) suspended or expelled special education students.

b. Regulation 300.121(d)(3)(ii) requires that sufficient services to enable the student to progress (not just "participate") in the general curriculum and his IEP program.

c. However, FAPE is not required for suspended students for 10 school days or less [300.121(d)(1)].

d. Because the student is in another setting, the services may not be identical nor at the same level. A hearing officer in *Troy City Board of Education* (SEA Ala. 1998) 27 IDELR 555 affirmed the district's provision of only 4 hours of tutoring a week in spite of an IEP prescribing regular education classes.

e. Hearing officer found that 3 hours a week of homebound setting failed to provide FAPE to expelled student under drug zero tolerance offense. District ordered to place student in alternative school setting for a minimum of 20 hours a week of instruction as prescribed by IEP. Found that impossible to meet behavioral plan goals in home-bound setting. *Hawkins County Board of Education* (SEA TN 2001) 35 IDELR 23

f. LEA shall ensure that the student's special education and disciplinary records are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action. 300.524(b)

6. Non-Special Education Students - Protections for Children Not Yet Found Eligible for Special Education

a. A student considered for disciplinary action may invoke special education protections even though he/she has not been previously identified as such if the district "knew" the student had a disability. [1415(k)(8);300.527; *Alvord Unified School District* (SEA CA 2001) 34 IDELR 279; *Colvin v. Lowndes County School District*, (N.D. Miss. 2000) 114 F.Supp.2d 504, 32 IDELR 32]

b. Definition of "knowledge": The district is considered to have "known" or have a "basis of knowledge" that the child had a disability if:

  i. The parent has expressed "concern" in writing to school staff that child needs special education and related services;
  ii. The behavior or performance of the child demonstrates the need for such services [see *Jurupa Unified SD* (SEA CA 2000) 34 IDELR 53]:
  iii. The parent has requested an evaluation;
  iv. A teacher or other school employee has "expressed [orally or written] concern about the behavior or performance of the child."

c. Stay Put exception for assessment request: 1415(k)(8)(C)(ii)

  i. If parent challenges the removal of a not-yet-identified student for special education,
  ii. Stay put applies;
  iii. If district invokes the 45-day IAES stay put exceptions (by either administrator or hearing officer); and
  iv. A request for assessment is made;
  v. The assessment shall be expedited; and
  vi. During the expedited completion of the assessment the student shall remain in the placement determined by school administrators.

7. Reporting Crimes 1415(k)(9)

a. Nothing in IDEA prevents the district from reporting a crime committed by disabled student to authorities, or prevents state judicial authorities or law enforcement from exercising their responsibilities. 300.529 [*State of Connecticut v. David F.*, 29 IDELR 376 (Conn. Super.Ct. 1998); *Wayne*

County (GA) School District, 35 IDELR 71 (OCR 2001); *Madison School District* (SEA WI) 34 IDELR 273 The decision by case manager who was kicked by student to refer to police did not deny FAPE. While acknowledging that kicking was a manifestation of student's ED, HO concluded that nothing in IDEA prohibited the district from referring the crime to the police, who removed student from school.

b. When reporting crimes, the district must transmit copies of student's special education and discipline records to the proper authorities, if permitted by FERPA. 300.529(b)

c. Some state laws require that whenever an employee is attacked, assaulted, or physically threatened by any student it shall be the duty of the employee and his or her supervisor, who has knowledge, to promptly report the incident to law enforcement. Also for assault with a deadly weapon on student or employee, and possession or sale of controlled substance. [e.g., California Ed.Code 44014; 48902]

8. **Functional Behavioral Assessments (FBA or FAB) & Positive Behavioral Intervention Plans (P-BIP's)**

a. Required in IEP when the child's behavior impedes his or her learning or that of others. 1414(d)(3)(i); 300.346(a)(2)(i)

b. Within the 10 days of suspension (no later than the 10th day) 1415(k)(1)(B)

c. If student has a behavioral intervention plan (BIP) the IEP team shall review the plan and modify it as necessary to address the behavior in question.

d. When suspending more than 10 days or considering expulsion - cannot expel if FBA or BIP is missing or inadequate! [1415(k)(1)(B)(i) - (ii); Note: this is a frequently occurring and serious problem.

e. Elements include:

   i. Based on data from Functional Behavioral Assessment;
   ii. Targeted maladaptive behavior to be diminished/extinguished in measurable description and replacement behaviors;
   iii. Identify effective reinforcers and punishments;
   iv. Measure of frequency of behaviors;
   v. Modifications when interventions are ineffective;
   vi. Generalization across multiple settings (e.g. school, playground,

home, job sites, residential setting). Requires collaborative effort;and

- vii. Emergency interventions for spontaneous, unpredictable behavior which poses clear and present danger of physical harm which requires temporary technique to contain the behavior.

9. Discipline of Section 504-Only Students

a. Significant change in placement? Beyond 10 consecutive days or a "pattern of exclusions" [*Orangeburg Co.Sch.Dist.* (OCR SC April 1997) 26 IDELR 1314.

b. If yes, a "relatedness," not 3-pronged "Manifestation Determination" must be conducted to determine whether the misconduct was caused or related to the student's disability.[504 Regulations provide no guidance re MD; see *OCR Staff Memo* 1989, 16 EHLR 491]:

- i. Was misconduct *related to* students disability?
- ii. "Manifestation Determination" 3-part test under IDEA is not required. [see *Amphitheater Unified School District* (OCR AZ 2001) 35 IDELR 42; *Union Public Schools* (OCR 1999) 32 IDELR 185]
- iii. IEP team as required by IDEA not necessary, but need to convene 504 team meeting.
- iv. Section 504 team meeting, including:
  - (1) group of persons knowledgeable about:
    - (a) the student
    - (b) meaning of evaluation data
    - (c) accommodations and placement options
  - (2) the parent [see *Amphitheater (AZ) Unified School District* 35 IDELR 42 (OCR 2001)]
  - (3) decision should be based on "such recent and relevant information which competent professionals would require, including psychological data related to the student's behavior." *[OCR Staff Memo* 1989, 16 EHLR 491]

c. Rights of Student to:

- i. Evaluation but not as comprehensive as special education
- ii. Review pupil records
- iii. Impartial due process hearing
  - (1) District
  - (2) not under jurisdiction of state's Special Education Hearing Office

        (3) not right to notice of due process hearing, but wise to do so
    iv. Review/appeal process
    v. Behavioral plan when behavior interferes with his and others' ability to obtain educational benefit [see *Pentucket (MA) Public Schools* (OCR 2001) 35 IDELR 38

d. Stay Put applies to 504 only students for removals beyond 10 days

    i. Pattern of suspensions:
        (1) total;
        (2) length of suspensions ("chunks")l; and
        (3) proximity to one another.

e. 45-day interim alternative educational setting (IAES) applies to guns only, probably not weapons and drugs as under IDEA [*Letter to Zirkel* (OCR 1995) 22 IDELR 667].

f. Not previously identified 504 only student may have same protections as under IDEA 1415(k)(8) when "basis of knowledge" exists. [see *Washington Unified School District* (OCR CA 1998) 29 IDELR 486.

SELECTED DISCIPLINE CASES

Manifestation Determination

Oceanside Unified S.D. (SEA CA 2001) 35 IDELR 27 This case dealt solely with the issue of the student's ability to control his behavior. The hearing officer found that a 17-year student's act of throwing trash can through a windshield of car was calculated response to a threat, not a sudden uncontrollable outburst of anger. Misconduct of student was not considered a manifestation of student's learning disability and visual and auditory processing disorder. Student admitted that he understood that what he did was a violation of school rules. He did not understand that his conduct could result in expulsion but that he fully understood that what he did was wrong and that it would subject him to disciplinary action. Student's learning deficits impaired his writing and math skills not his damaging another student's car. Psychological testimony presented the possibility that student may suffer from an "intermittent explosive disorder." HO considered criteria for ED but found that student's actions were not out of proportion to the conduct that precipitated the event, a threat on his life from a gang member. Further student wanted to send a signal to other student not to mess with him. He walked 20 to 30 feet to get trash can and returned to the car. This was evidence that his acts were not a sudden outburst of anger but a calculated response to a threat.

Meaning: This case illustrates how a hearing officer (or judge) will consider the facts regarding a student's misconduct to determine whether he was able to control his behavior.

Richland School District v. Thomas P. (W.D. Wis.2000) 32 IDELR 233 During a manifestation determination the district determined that a student's learning disability did not cause him to destroy $40,000 worth of school property. Mother subsequently obtained a psychologist who diagnosed student with ADD and dysthymia, which in his opinion caused the misconduct. Hearing Officer found psychologist's testimony credible and overturned the district's expulsion.

Meaning: Hearing officer can overturn district's manifestation determination based upon psychologist's diagnosis after the IEP team decision. See also *Union High School District* (SEA CA 2001) 34 IDELR 303:

Laurens County School District (SEA SC 1999) 31 IDELR 204 A 14-year old educable mentally retarded (FS IQ = 68) with ADD was expelled for fighting another student, was verbally abusive and hit and kicked school police officer who forced her to the ground, handcuffed her and transported her to Department of Juvenile Justice. District conducted a MD, which misapplied a standard of "whether or not Shameka [and her mother] understood the seriousness of what had happened." The HO concluded that the district did not conduct the MD properly. The district focused on whether the student knew right from wrong, rather than whether her actions were a result of her disability. The decision cites *S-1 v. Turlington*, [633 F2d 342 (5th Cir. 1981)], which states that knowing right from wrong is not the correct basis for determining that the student's misconduct is a manifestation of their disability. The IEP team's fact-finding process was faulty and its documentation for its conclusions was vague and did not clearly state what information was gathered and reviewed to make the determination that her behavior was not a manifestation of her disability. The HO outlines the questions that need to be addressed at a MD IEP meeting.

Meaning: District's must adhere to the three prong test for Manifestation Determinations and the IEP should document clearly the basis for the team's decision. This case has good discussion as to a proper inquiry for MD's.

Interim Alternative Educational Settings (IAES)

Lewiston School Department, (SEA ME 2001) 35 IDELR 58: Hearing officer ruled that district's IAES offer of 2 hours a day of tutoring off school site with counseling and OT consultation was appropriate temporarily while awaiting placement in day treatment program.

Letter to Shows (OSERS 2000) 33 IDELR 223: At the end of the school district's 45 day IAES placement, an extension of time may be sought from a hearing officer. A district could also seek a court order at any time to remove the student from school. However, the student's educational services could not be terminated in the event of a suspension or expulsion.

Meaning: Placement of student in IAES's is not limited 45 days. May be able to "stack" 45 day IAES removals by (1) district and (2) hearing officer and even beyond through a (3) court injunction. Of course, if parent agrees, the IAES placement may exceed 45 days. [See also OSEP 1997 Letter to Bachman 29 IDELR 1092]

Hempfield Scool District (SEA PA 1997) 27 IDELR 406: An appeals panel concluded that hearing officer properly denied a district's request to remove a student with mental retardation and a speech and language impairment to an IAES. While district met its burden to show that maintaining student in current placement would result in injury to the student and others, the district failed to show that the proposed IAES would address the student's behavioral needs.

Letter to Anonymous (OSEP 1998) 30 IDELR 710: IDEA 1997 does not specify what constitutes a appropriate services during an IAES. What's appropriate during an IAES placement depends on the circumstances of the particular case. However, the greater the opportunity for the student to receive the services in his/her IEP, the more likely it will be deemed appropriate.

Need to Continue Educational Services to Long-Term Suspensions or Expelled Students

34 CFR 300.522

Hawkins County Board of Education (SEA TN 2001) 35 IDELR 23 Hearing officer found that 3 hours a week of homebound setting failed to provide FAPE to expelled student under drug zero-tolerance offense. District was ordered to place student in alternative school setting for a minimum of 20 hours a week of instruction as prescribed by IEP. Found that it was impossible to meet behavioral plan goals in home-bound setting.

Letter to Parker (OSEP 1997) 30 IDELR 52: Letter states that school districts are obligated to provide FAPE to all students with disabilities, even those who are suspended for more than 10 days or expelled for misconduct not related to their disability.

Letter to Skelton (OSEP 1997) IDEA 1997 attempts to strike a balance between the obligation to provide FAPE to disabled students and the need to provide a safe learning environment for all students. OSEP takes the position that students who are expelled for misconduct unrelated to their disability are entitled to the provision of FAPE.

Referral Student to Law Enforcement

Wayne County (GA) School District, 35 IDELR 71 (OCR 2001) OCR found that court-ordered removal of student from school relieved the district of its obligation to conduct a manifestation determination. Neither the act of calling the police or consequent placement from that referral triggered the district's duty to afford student of procedural safeguards. [see also *Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998)]

Madison School District (SEA WI 2001) 34 IDELR 273 A case manager referred to police a 14 year-old, ED student who deliberately kicked her. Hearing officer determined that the student was not denied FAPE. While acknowledging that kicking was a manifestation of student's ED, HO concluded that nothing in IDEA prohibited the district from referring the crime to the police. The student's behavior was related to his ED, it also constituted a crime and was considered reasonable for her to contact the police. The HO also upheld the IEP team's decision not to include a behavior intervention plan in the IEP because the kicking was the only documented occurrence of confrontational behavior.

Gateway Unified School District (OCR CA 1995) 24 IDELR 80: OCR found that district did not violate Section 504 and ADA and acted properly when referring student to police for dangerous behavior and was not responsible for injuries suffered by the student while in police custody. The district was not responsible for the student's restraint by the police. The student's IEP behavioral plan called for physical restraint

North East Independent School District (SEA TX 1997) 26 IDELR 688: Calling the Police to report misconduct did not violate the student's IEP. The behavior plan permitted the district to call the police when the student violated any laws and the student's mother had agree to these provisions of the plan.

Section 504

Letter to Zirkel (OCR 1995) 22 IDELR 667: Gun-Free Schools Act and "Jeffords Amendment" apply to Section 504 students. OCR discipline guidance, reported at 22 IDELR 531, provides information on the application of these laws to 504 students. Forty-five day, administrative interim placement for drugs not applicable to 504-only students.

Juvenile Court System

Cabot School Disrict SEA AR 1998 29 IDELR 300. Hearing officer concluded that the school district using the juvenile justice system to avoid complying with IDEA, and directed the district to submit status reports to the Arkansas DOE every 30 days until it complied with IDEA.

State of Connecticut v. David F. (Conn.Super.Ct.1998) 29 IDELR 376 . According to OCR, report crimes to state law enforcement or juvenile justice system permissible. But, OCR supported parent's charge that school district did not hold manifestation determinations before referring students to the juvenile justice system. District agree to hold IEP or 504 MD meetings prior to referring students to juvenile justice system except in extreme circumstances, when student poses a threat of serious physical injury. [see also *Hickman County School District* (OCR TN 2000) 34 IDELR 294]

Note: The findings in these cases are probably superceded by the 1999 regulations that specifically allow referrals to law enforcement. Section 300.529

Honig Injunctions

San Ramon Valley Unified School District (SEA CA 2000) 33 IDELR 21: The school district obtained from state court a temporary restraining order (TRO) to remove a fourth grader from school showing that there was a substantial likelihood of harm to the student or others to remain at school. Petitioner argued that the state Special Education Hearing Office has authority to apply federal law, which would preempt the TRO based on state law. The district argued that the Hearing Office does not have jurisdiction to modify or overturn the court's order and that IDEA does not affect a school district's ability to obtain a court order removing dangerous students from campus under *Honig v. Doe* (1998) 484 U.S.305, 327-328. The hearing officer concluded that the state Hearing Office lacks jurisdiction to order stay put to overturn court's injunction to remove student from school and that state and case law allows for court orders as an exception to stay put.

Weapons

Chester Upland School District (SEA PA 2001) 35 IDELR 104: A switch blade knife disguised as a cigarette lighter was found on a a tenth grade, LD, ED student. The district found act not a manifestation of student's disability and held an IEP to place the student in an IAES. The parent disagreed and filed for an expedited hearing. The hearing officer concluded that the knife did not constitute a weapon under federal law and an object incapable of causing serious bodily injury and ordered the student to remain in his current placement. An appeals panel overturned the hearing officer and concluded that the knife clearly fit the applicable definition of a knife. The panel pointed out that the hearing officer erred by applying the wrong "dangerousness" standard, which only applies to hearing officers not school administration.

Anaheim Union High School District (SEA CA 2000) 32 IDELR 129: A paper clip that was used to cut another student was found not to be a "weapon" under IDEA. Thus, IAES as an exception to stay put was not allowed. Further the district failed to show that student intended to use paper clip to cause death or serious bodily injury or "ready capable" of inflicting such harm.

Independent School District No. 279, Osseo Area School (SEA MN 1999) 30 IDELR 645: Paintball gun not "dangerous weapon." The paintball gun was not determined to be used for or readily capable of causing death or serious bodily injury within the federal law definition of weapon. The device was more akin to that which was used for a recreational sport, rather than a firearm. District was also found out of compliance when the IAES was determined by administrators, rather than an IEP team.

Threats by Students (post Columbine)

Haxtun School District (OCR 1999 Colorado) 32 IDELR 178: Student with bipolar disorder and ADHD made threats of violence and brought a pocket knife to school shortly after Columbine shootings. OCR concluded that district did not discriminate against student when it called police and locked-down the school. Student was placed in an IAES for 45 days.

NORTH CAROLINA'S TRIAL COURT DEFINES MINIMUM PERFORMANCE STANDARDS UNDER GUIDELINES SET IN ITS SUPREME COURT FUNDING EQUITY CASE

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
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Parents and other interested parties have been seeking through the courts mandates to require school systems to provide all children an equal educational opportunity based upon equity in funding since the early 1970s beginning with a federal case in Texas, *San Antonio Independent School District v. Rodriquez* (1973). In *San Antonio Independent School District v. Rodriquez* (1973) the U.S. Supreme Court ruled that the inequality of local school funding by states was not a violation of the Federal Constitution; and thereafter, plaintiffs sought relief through state courts. This federal case was immediately followed by two state cases beginning with *Serrano v. Priest* in California and *Robinson v. Cahill* (1973) in New Jersey. Since the filing of these two state cases dozens of state cases seeking financial equity have been decided by state supreme courts ending with the latest state equity case in North Carolina, *Leandro v. State of North Carolina* (1997). These and other state cases sought financial equity in the funding of state public schools. But beginning in the 1990s state high courts rulings in school finance equity cases shifted from the concept of fiscal equity to fiscal adequacy; and specified the minimum level of educational skills state public schools should provide all students (Odden and Picus, 2000: 36-39 and Moran 1999:15).

The lack of educational equity among a state's public school systems have been challenged in federal courts but a 1973 U. S. Supreme Court decision in *San Antonio Independent School District v. Rodriquez* ruled that state supported education was not protected under the federal constitution. This decision halted challenges against unequal state school finance systems in federal courts and litigants then moved to state courts to hear their complaints; but these complaints were valid only in states where their constitutions provided for free and adequate education for all.

Over the past decade, all states have pushed for educational reform to improve students' academic performance using a variety of strategies: smaller class size, smaller schools, charter schools, educational vouchers, higher teacher salaries, improved teacher training, and greater accountability through "high stakes" testing. But, the one strategy that involves equality in school funding across school districts has attracted national attention because of connecting students' performance to school funding. This concept is called *educational adequacy* by several state courts (Reschovsky, and Imazeki, 2001). In 10 states their courts have found state school financing systems unconstitutional because they have not provide students in every district of the state with a minimum quality of education, which the courts have, titled educational *adequacy*.

This paper explore how the various state High Courts define an adequacy education and how much funding is required to fund this education; comments by scholars in the field of school finance on a definition of educational adequacy and an analysis of the most recent state supreme court decision on educational adequacy which it calls a sound basic education. The paper then provides a more specific review of the latest North Carolina court decision in this area (*Hoke v. State of NC*, 2001). This North Carolina case provides a unique opportunity to review the thoughts of the judicial and executives branches of state government.

In most states, their systems of financing public schools do not link the availability of funds to the educational performance of students. Most states' school financial systems evolved from local properties taxes and a combination of other state taxes-sales taxes and income taxes-which produces different levels of income per student from school district to school district.

The reason state school finance systems have failed to provide equal education for students in all school districts, is because formulas that allocate state funds to school districts do not recognize the amount of money needed to provide students with an equal education (Reschovesky and Imazeki, 2001:375). Costs in some districts are greater than others because more resources are needed to educate some students than others, some districts are willing and able to pay more than other districts to attract high-quality teachers, and generally, more high-quality teachers are attracted to seek employment in high-income neighborhoods than in low-income neighborhoods.

If cost differences across school districts are significant, then mandating statewide student academic performance standards without reforming how funding is distributed among districts will result in school districts with above average costs not having the resources needed for their students to meet accountability standards. The practice of state accountability programs to reward teachers in high performing schools and punish teachers in low performing schools is not due to a fundamentally change in the state's funding of local school districts. State financial aid formulas do not take into consideration differences in costs among school districts; but most states provide special categorical aid to local school districts for students with special needs such as: special education, school levels, and students at risk (Reschovesky and Imazeki, 2001:376).

Many of the some 40 states responding to challenges to the constitutionality of their school finance systems have made changes, but still have not achieved equity of resources across school districts within the individual states, such as-California, Michigan, Kansas, New Jersey, Tennessee and Kentucky. Two states, Hawaii and North Carolina have a higher degree of financial equity across school districts within their individual states due largely to history and not a response to litigation. Hawaii consists of one school district and North Carolina comes from tradition. North Carolina is under court order to develop a financial system to produce a "sound basic" education for all students (*Leandro,* 1997). Tennessee improved equity after litigation against its financing system (Peevely and Ray, 2001). However, it should be noted that not a single state court supported plaintiffs against challenges against their states school finance system resulted in financial equity across all school systems (Burke, 1999).

To win challenges to state finance systems, plaintiffs must define adequacy in factual contexts with such school data as: literacy rates, percentage of students performing below state standards and the number of students graduating and attending institutions of higher education; the ability to offer enough specialized course in foreign language, special education, and advanced placement courses; faculty quality-the number of teachers with master degrees and certified in their teaching fields (Moran, 1999:43-45). On the other hand, the states have a good chance of prevailing against plaintiff school districts if they have established high academic standards, even with significant disparities in per pupil expenditures across school districts (Moran, 1999:47). Nevertheless, reducing across districts expenditures may do little to reduce disparities within districts resulting in greater school expenditures on the children from middle class families compared to those from low-income families (Wenglinsky, 1998). These differences in expenditures on the wealth compared to the poor may be revealed in the different courses and experiences received and the quality of the teachers instructing each group. A higher percentage of middle class children may be enrolled in small gifted classes with technology along with better-educated classmates (and with more experienced teachers who are paid more due to their greater years of teaching and earned degrees).

The educational adequacy concept in school finance movement which came through the courts is based upon the assumption that "equals ought to be treated equally" by government. This idea is basic to our constitution and should not be based upon how students and parents receive it or how educators receive it. Does money make a difference in the quality of education received by school districts to educate their students? The answer is a definite yes! But, it is almost impossible to estimate that difference until we achieve financial equity (Verstegen and King, 1998). The reason why it is difficult to predict the role of funding to academic achievement because experimenting with human beings in this context would be almost impossible. For example, it would be unethical to move wealth children from their wealth school setting and place them in an educational inferior setting to test the impact on their achievement due inferior schooling or to reverse the equation to place poor children in a wealth educational setting for 13 years to test the impact of this change in their school performance. We cannot reverse their environments for long periods of time and few wealthy parents will volunteer their children to participate in such an experiment; and the poor will not likely be given such an opportunity. Yet, the limited research on the impact of money on students' achievement is generally positive (Verstgegen and King, 1998). The latest educational adequacy case, March 2001, involves challenges to the state's financial system in North Carolina, which provides us with the opportunity to view the evolution of this process through the courts (*Leandro*, 1997 and *Hoke*, 2001).

The North Carolina Adequacy Case

In 1997 the North Carolina State Supreme Court upon hearing a challenge to the adequacy of funding public education against the State held for the plaintiffs. The Court

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held that the State had a responsibility to provide every child with an adequate/sound basic education (*Leandro*, 1997). Given the challenge to the present system of funding public education in the State the High Court reasoned that:

1. Whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality. The right to education provided in the state constitution is a right to a *sound basic education*. An education that does not serve the purpose of preparing students to participate and compete in society in which they live and work is devoid of substance and is constitutionally inadequate.
2. The Court agreed that each child should be afforded a *sound basic education* but it did not agree with the plaintiffs the equal opportunities clause of the Constitution on education requires the state provide each district substantially equal funding or educational advantages in all school districts.

In North Carolina the state has been responsible for funding the operating expenses of the instructional program for the nine-month school term. The state pays the salaries of teachers and administrators, supplies, transportation, and books. These funding formulas are different from those used in other states. These formulas, unlike those in other states, where state funding formulas are used to calculate the amount of state funds to be given to local school districts to spend. In North Carolina, state school funds provide the actual resources needed to provide the state's standard course of study based upon average daily membership. Counties, not local school districts, are responsible for providing funds beyond state funds to building needs, and they may choose to improve schools through additional employment or purchase or supplement the state salary schedules.

North Carolina local school districts do have taxing authority. All school districts must get the approval of their respective county commissioners to tax residents for support beyond support directly from the state for basic operational expenses. Nearly 95 percent of the school districts in the state are countywide units: there is only one public school system per county. In the low wealth counties, the entire operating budget comes from the state, there is no local supplement to increase teacher salaries, add new positions, or purchase additional school supplies. In medium wealth districts, they are more than likely to convince county commissioners to levy a local property to increase teacher salaries by one or two percent above the state salary schedule for teachers and administrators. However, in high wealth districts, county commissioners are likely to approve a tax levy to support a local supplement for higher teacher salaries and additional teacher positions as needed. The county commissioners are elected officials and must respond to requests for the allocation of resources for multiple county functions, not just schools. There is no direct citizen vote on tax resources for schools, but county commissioners in most cases allow local residents to vote directly on school bond issues.

In 1991 the State established two programs to help low wealth school districts: the Low-Wealth supplemental Funding Program and the Small-Schools Supplemental Funding Program (Brown, 1998). Counties (and their school districts) may receive funds under the Low-Wealth Supplemental Funding Program if their property tax base per student, as adjusted for assessment levels and modified by relative income levels, is below the statewide average level of property tax base. But, they are disqualified if their county property tax rate is below the statewide average adjusted property tax base. The Small-Schools Supplemental Funding Provides additional resources to county school administrative units with total enrollments below 3,000 and to county units with total enrollments of 3,000 to 4,000 whose adjusted and modified property tax base per student is below the statewide average. Benefits from this program could include additional teachers to offer the standard course of study.

Only ten states use flat grants as their primary funding mechanism: Arizona, California, Connecticut, Oregon, Arkansas, Delaware, Nebraska, New Mexico, North Carolina, and South Carolina. But North Carolina's flat grant school finance program comes the closest to "full" state funding of public education.

The State Supreme Court reviewed the problems experienced in other states where their high courts have held that their state constitutions guaranteed the right to an equal education and concluded that such a goal was impractical or unattainable goal and settled on a goal of ensuring each child with an adequate education (sound basic education). The High Court felt that the state had the power to do these things reasonably well and still meet their constitutionally duty.

The Court held that relief for the plaintiffs might be granted if their claims are supported by the evidence (Boger, 1998, Brown, 1998). The case was remanded to the trial court to permit plaintiffs to proceed on those claims. Educational goals and standards adopted by the legislature may be considered on remand to the trial court for its determination as to whether any of the state's children are being denied their right to a sound basic education. The trial court may also consider the level of performance of the children of the state and its various districts on standard achievement tests. The Court felt that such output measurements might be more reliable than input measurements such as per-pupil funding provided by the state. But, standardized test may not be treated as an absolute on this issue. The trial court may consider the level of the state's general educational expenditures and per-pupil expenditures. The North Carolina Court in reviewing additional funding of the Kansas City Schools had some doubts on the results of additional funding on student learning as expressed in *Missouri v. Jenkins (1995).*

In March 2000 the trail court (*Hoke County*, 2001) issued the third of three interim decrees brought before it by the Hoke County School System as a follow up to the *Leandro* educational adequacy case. Hoke county school system is a poor rural community enrolling about 6,000 students lacking financial resources of wealthier school systems in the state and where their students cannot compete academically with students from wealthier school districts. The students consist of 50.0 percent African American, 32.7 percent white, 13.4 percent Native American, 3.0 percent Hispanic American and 0.9 percent Asian American. The trail court concluded that regardless of disparities in school districts' wealth, students generally could be placed into two groups, students at risk and students not at risk for school failure. Further, comparison of all school systems in the state revealed that there were students failing to achieve a sound basic education statewide, as well as in Hoke County. The low performance of at risk students was similar regardless of the wealth and resources of the school system attended when you disaggregate students' achievement data (*Hoke* at 35). This was true when the court compared the cost spent per class in Hoke County School District to Charlotte School System of $17.264 and $49,660 respectively; a difference of more than $32,000 per classroom. The trail court concluded that at-risk children in North Carolina are not obtaining a sound basic education due to the lack of an effective educational strategy for at-risk children, not differences in state funding. The court defined a student as being at-risk if that student scored below level 3 on a four point scale on state mandated examinations (*Hoke at 65*). The judge believes that at-risk students may require more resources to be adequately educated (*Hoke*, 2001:71).

The trail court was not convinced that the failure of schools to properly educate at-risk students was due to a lack of sufficient state funding. Instead, the *Hoke* Judge believed that state funds are not being effectively applied to at-risk students to meet the principles established by the High Court in Leandro (*Hoke*, 2001*:75-78*):

1. All children have an equal opportunity to receive a sound basic education, nothing more.
2. The sound basic education is qualitatively defined and an appropriate educational strategy to provide children with the opportunity to receive a sound basic education is required. When one graduates from high school, they should be able to get a job or attend college.
3. In the event that children are not being provided the equal opportunity to obtain a sound basic education because of inadequate educational programs and strategy, the educational programs and strategy must be changed to accomplish the constitutional mandate. The state not required to provide a prep school education with courses that will make it possible to attend Yale or Harvard by taking high level electives, modern dance, advanced computer courses and multiple foreign language courses.
4. In the event there is not sufficient funding to provide for sound basic educational programs, funding must be appropriated to meet the constitutional mandate before it can be spent on high academic "frills and whistles".
5. Funds must first be used for the purpose of providing children with the equal opportunity to received a sound basic education.
6. In the event of a deficit in the sound basic education component, funds that are being used for the purpose of providing educational programs not part of the sound basic education must be re-allocated and applied to the sound basic education until any deficit in that program is abolished.

The trail court ordered state school systems and the State to put in place programs that provide all children with a sound basic education and if the funding is being used for any other educational purpose than to meet this mandate, these funds must be reallocated to provide a sound basic education for at-risk students. The court ordered the state to also considered offering pre-kindergarten instruction for at-risk students. The State and its school systems are directed to assess present educational programs as applied to at-risk students and adopt a uniform strategy for improving the educational opportunities for at-risk students, re-assess and re-allocate funds, to meet the needs of at-risk children; and report their results within twelve months with quarterly progress reports to the court. The judge stated that he drew these conclusions based upon students' performance data and common sense and gave little value to testimony of expert witnesses. The judge did not believe that the $32,000 difference in expenditure per class between Hoke County and Charlotte which bought better teachers and facilities made a difference in moving more children out of the academic at-risk category.

The court concluded that providing a higher quality of education for non at-risk students, beyond a sound basic education was not required by the state and transfer these funds for use on at-risk students. Both plaintiffs, Hoke County School District and the defendant, State of North Carolina have plans to appeal this ruling by the trail court to a higher court. The plaintiff school district does not like the idea of reallocating funds from programs aimed at gifted students to programs for at-risk students and felt that educators know better than the court as to how to educate students. The State doe not feel that it should be involved in setting a uniform educational strategy for all schools on how best to educate students across the state. The Governor has established a commission to study this educational problem.

Adequacy: Conclusions

Many students come to school from disadvantaged educational backgrounds and many come to school from educational advantaged backgrounds which researchers label these characteristics as education inputs, along with funding and school achievement as an output (Slavin, 1999). Thus, some argue that in order to provide educational equity one must focus on education input variables needed to produce an adequate (sound basic, uniform or a through and efficient) education for all students (Slavin, 1999 and Ward, 1999).

The poor in this country is relatively politically powerless compared to the wealth and school finance is a highly political product. Equal educational opportunity may be a part America's ideology but the results of school finance litigation and politics over the past decades suggests that it does not have strong commitment from the politically powerful in this country (Ward, 1999).

It was almost 26 years ago that the New Jersey Supreme Court ordered that state to provide each student with a thorough and efficient education (*Robinson v. Cahill,* 1973, *Abbott v. Burke,* 1990 and *Abbott v. Burke,* 1998). Yet, we still do not have educational adequacy in the state of New Jersey (Goertz and Edwards, 1999).

Today, we see a complete shift in school finance legal cases from equity in earlier cases to educational adequacy (Clune, 1998:376-378). There is a belief that most state courts have reached a consensus in defining adequacy as high minimum achievement for the average student (Clune, 1998:377). But, however we define educational adequacy or set a cut off point in the normative sense for students' academic performance, producing an operational definition is difficult (Levin, 1998; Goertz, 1998).

Goertz (1998:614) asks: Will states reduce state standards when the cost of meeting those standards is more than the state is willing to support? What happens when the state is unwilling to set standards high enough to ensure educational adequacy? If we arrive at this position, we are back where we started in efforts to improve education for children in low wealth school districts. If state courts refuse to impose adequacy plans on state legislatures and the poor is too powerless to achieve their educational goals through the political process we will continue to see little change in state school finance systems (Alexander and Salmon, 1995: 244-271).

Traditional responses by school systems for educating children at-risk involves some form of sorting and selecting: grouping/tracking, retention, special education placement, Chapter I pullout programs and placement in special programs or schools for potential dropouts (Legters and McDill, 1994). The court's dilemma on how best to set policies for educating students at-risk is well conceptualized by Gordon and Yowell (1994:63):

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> The problem is that it is relatively easy to arrive at agreement on what students should know and know hoe to do, while it is very difficult to agree on what educational inputs should be to achieve these aims without becoming overly prescriptive or what is more problematic politically, without having questions concerning entitlements and the fixing of responsibility for costs. If the field can ever agree on a set of standards for professional practice and school capability, do we then have a basis for asking the courts to hold schools or states responsible for making them available, especially to children at-risk of school failure?

The North Carolina court provides us with the latest view of educational adequacy involving legal challenges to state school finance systems. The North Carolina Trail Court in *Hoke* shifted the blame for the poor education of children enrolled in financially poor districts from a lack of adequate state funding to ineffective local educational programs; and these failing school systems should shift funds from programs enrolling advantaged students to better educate at-risk students. This *Hole* court holding may not be supported the High Court upon review by the State Supreme Court but it appears that the idea of educational adequacy is here to stay. State courts seem likely to continue to demand that states guaranteed every child an adequate or minimum level of education even if we cannot agree on where to set the bar for this minimum level of education. Nevertheless, school administrators must prepare data to match students' educational outcomes with funding programmatic levels.

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LEGAL IMPLICATIONS OF THE CONTRACT TO EDUCATE: THE STUDENT CONSUMER IN AMERICAN HIGHER EDUCATION

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Legal Implications of the Contract to Educate: The Student Consumer in American Higher Education

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The relationship between institutions of higher learning and the college student has been refined and revised by the courts since the nascence of American higher education. As American society has developed, new demands have been placed upon colleges and universities by their primary constituency, the student, for less paternalism and more accountability for services rendered. This dynamic relationship can be characterized by a judicial evolution from a time in which the university stood *in loco parentis*, or in the place of the parent, to the current contractual perspective, in which the student represents a consumer and the university the provider.

In the modern era, the judiciary uses the lens of classic contract principles to review lawsuits involving disputes over tuition, fees, and auxiliary services. The judges tend to review the specific terms and language of these contracts, remain within the "four corners" of the contract document, and issue opinions accordingly. This approach tends to favor institutions, which generally have the advantage in constructing the language of contracts related to tuition and fees or auxiliary services such as housing and food service. [*See, for example, Gamble v. University System of New Hampshire* (1992) in which a retroactive increase in tuition was permissible under the terms of the contract.] Institutions may also derive advantage from language within the contract granting a right to alter or modify the terms of the agreement due to changed circumstances. [*See, Straight v. State University* (1990) involving a charge for previously free transportation services. *But see Arriaga v. Members of the Board of Regents* (1992) in which the unilateral alteration of the contract for tuition violated the constitutional prohibition on impairing contracts because the alteration was derived from state legislative mandate.]

In this review, the authors examine other instances in which state and federal courts have applied contract law to the relationship between college student and institution. These cases are divided into areas involving discipline, the academic program, program elimination, and consumer fraud.

Disciplinary Due Process

While due process protections secured under the Fourteenth Amendment are applicable to public institutions of higher education, [*Regents of University of Michigan v. Ewing* (1985) and *Board of Curators of the University of Missouri v. Horowitz* (1978)], constitutional due process protections do not extend to students at private institutions. Private institutions are bound by the disciplinary standards of their institution only to the extent that a contractual obligation has been created. While the judiciary tends to apply strict construction to express statements made in university publications concerning disciplinary procedures and is stringent in ascertaining whether colleges and universities follow their stated disciplinary procedures, the standard of substantial compliance with policies and procedures prevails. [*Melvin v. Union College* (1993)] Students who allege violations of institutional due process standards must show a specific breach to warrant judicial intervention. [See *Schaer v. Brandeis University* (2000), in which the court ruled that the student had failed to show sufficient evidence of specific breach in the institution's disciplinary process and *Warren v. Drake University* (1989) in which the student failed to demonstrate that the institution violated an express term of its disciplinary standards. *See also Gagne v. Trustees of Indiana University* (1998), in which the student failed to establish a contractual right to a review board hearing; *Ben-Yonatan v. Concordia College Corp.* (1994), in which the court ruled that the private college satisfied all contractual obligations to a suspended student when it followed the judicial terms outlined in its publications; *Harwood v. Johns Hopkins University* (2000), in which the appeals court ruled that the institution met its obligation in satisfying due process prior to denying award of the degree; and *Nash v. Auburn University* (1985), in which dismissed students failed to identify a specific breach of the procedures applicable to a university honor code violation.] In particular, when due process protections are extended to students at private institutions, courts examine disciplinary scenarios with regard to the institution's satisfaction of the student's due process rights. Courts are hesitant to intervene in the decisions made by academic institutions, but will hear contract claims based on disciplinary due process violations to determine whether the institution acted in an arbitrary or capricious manner.

The precise language of university publications can be construed in favor of the student when the institution does not follow published disciplinary procedures [*Fellheimer v. Middlebury College* (1994)], particularly when the student can be said to have substantially performed all obligations under the contract. [*Russell v. Salve Regina College* (1991) *and James v. Wall* (1989)] However, student contract claims based on a contractual relationship between student and advisor are less likely to be enforceable in the disciplinary context. [See, for example, *Shapiro v. Butterfield* (1996) in which a student censured for unethical conduct unsuccessfully argued a contractual relationship exists between student and advisor.]

The Academic Program

Judicial deference to institutions of higher education regarding academic matters pervades higher education case law, especially in light of two United States Supreme Court decisions that mandate deference to academia, except in cases of the overt abuse of authority. [*Regents of the University of Michigan v. Ewing* (1985) and *Board of Curators of the University of Missouri v. Horowitz* (1978)]

Admissions

A contractual obligation is often difficult to establish absent evidence that the student is admitted and has enrolled. [*Keles v. Yale University* (1995)] However, applicants for admission have established that offer and acceptance of tuition and fees creates a binding contract.

[*Steinberg v. Chicago Medical School* (1977).] However, applicants should not rely on representations made by university officials who lack the authority to contract for admissions, even if they appear to have authority. [*Elliot v. Duke University* (1984)] This is particularly true when representations by faculty and advisors are inconsistent with published institutional policies. [*Long vs. University of North Carolina at Wilmington*] However, evidence of an institution's bad faith or misrepresentation may influence a judge to recognize a contractual obligation based on an admission's agreement. [B*rody v. Finch University of Health Sciences* (1998)]

Grades

Judges are particularly reluctant to intrude on academic judgments related to grade appeals, even when the student asserts a right to graduate. [*Essigmann v. Western New England College* (1981) and *Davis v. Regis College* (1991)] Unless the student can make a persuasive showing that the grade awarded was made arbitrarily, capriciously, or in bad faith, judges generally concede that academic due process requires less stringent standards than disciplinary due process. [*See, for example, Tobias v. University of Texas* (1991); *Susan M. v. New York Law School* (1990); and *Harris v. Blake* (1986)] However, judges will intervene on behalf of the student when institutional decisions are clearly arbitrary and capricious. [*Sylvester v. Texas Southern University* (1997)]

Degrees and Degree Requirements

Academic decisions involving the conferral or withholding of degrees fall well within the umbrella of protection offered by the doctrine of judicial deference to the judgments of the institution even when the court tacitly acknowledges that the student-institutional relationship is contractual [*Clifton-Davis v. State of Oklahoma* (1996); *Kraft v. W Alanson White Psychiatric Foundation* (1985) and *Olsson v. Board of Higher Education of the City of New York* (1980)] Only in overt cases of abuse of discretion on the part of the institution will the judiciary intervene on behalf of the student. [See *DeMarco v. University of Health Sciences/Chicago Medical School* (1976) a case in which the court found the denial of degree was predicated on the student's failure to make significant monetary contributions to the institution.]

Altering degree requirements, when done under the clear authority and with the ratification of the institution's governing body, are also protected by deference to academic decision-making. [*Mendez v. Reynolds* (1997)] This is particularly true when the institution reserves an express right to alter or modify degree requirements during the period of the student's matriculation. [*Crabtree v. California University of Pennsylvania* (1992) and *Bruner v. Peterson* (1997)] In general, courts have refused to acknowledge an abuse of discretion when institutions impose additional requirements for graduation. [See *Bindrim v. University of Montana* (1988)]

The specific terms of the academic contract can be amended by mutual assent of the parties, i.e. the student and the university. [*Bleicher v. University of Cincinnati College of*

Medicine (1992)] Courts generally concede that the relationship between the student and the institution is contractual in nature, the terms of which are to be found in statements published by the university, but that the terms of that contract can be altered if the involved parties agree. [*Elliot v. University of Cincinatti* (1999) and *Chevlin v. Board of Trustees* (1989)]

Educational Malpractice and Consumer Issues

The system of American jurisprudence has been awash with claims of educational malpractice and the breach of a consumer relationship between student and institution. Courts do not recognize educational malpractice as a viable claim against an institution of higher learning for policy reasons stemming from reluctance to expand the tort liability of educational, non-profit corporations and the tradition of judicial deference to academia. [*Bittle v. Oklahoma City University* (2000); *Andre v. Pace University* (1996) and *Cavaliere v. Duff's Business Institute* (1992)] Accordingly, students have looked to contract theory to bring actions against colleges and universities that mirror the claim of educational malpractice. [*Ross v. Creighton University* (1992) and *Paladino v. Adelphi University* (1982)] Courts often pierce this veil and refuse to hear such cases. However, if a student avoids the broader claim of educational malpractice and emphasizes specific instances in which a college or university has breached the contract to educate, courts treat these specific allegations as claims under a contract theory and have considered relief. [*Clarke v. Trustees of Columbia University* (1996). But see *Gally v. Columbia University* (1998) in which students' educational malpractice claims against their institutions were recast as claims for breach of contract, but none-the-less rejected.]

Fraud

Fraud involves a false statement or omission of material fact made with the intent to deceive and induce plaintiff to act, plus justifiable reliance by plaintiff on the false statement or omission, and an actual injury to plaintiff as a result of the misstatement or omission. (*Lidecker v. Kendall College* (1990, p. 1124) Claims of fraud involving institutions of higher education have been difficult to establish. *[See, for example, Chiaka v. Rawles* (1999), in which the student was found to have failed to use reasonable diligence to ascertain degree requirements, and *Ottgen v. Clover Park Technical College* (1996) in which the court barred a fraud claim under the state's consumer protection act based on the public institution's immunity.] The exception to this general principle is that for profit, proprietary institutions appear more vulnerable to allegations of fraud. *[Moy v. Adelphi Institute* (1994)]

Consumer Protection

Fraud or misrepresentation claims brought under the terms of state consumer protection statutes have not provided significant additional protection to students. [*Hamilton Chapter of Alpha Delta Phi v. Hamilton College* (2000) and *Finstad v. Washburn University of Topeka* (1993). See also *Villarreal v. Art Institute of Houston* (2000), in which the student's fraud and contract claims were dismissed because she failed to show specific instances of reliance on any misstatements or any resulting injury.] Again, the exception to this general rule is that of private, for profit, proprietary schools, who engage in fraudulent inducements in order to enroll students. [*Manley v. Wichita Business College* (1985). See also *Malone v. Academy of Court Reporting* (1990), in which the court ruled that the student stated a valid claim under consumer protection laws that were applicable because "The school supplied services to consumers in a consumer transaction and plaintiffs have alleged facts of unfair or deceptive trade practices..." (p. 59). Also note *Alsides v. Brown Institute* (1999), in which the court held that state consumer protection laws apply to students: "By paying tuition, students have purchased an educational service. We therefore conclude that classes or course instruction provided by a private, proprietary, for-profit educational institution constitute a 'service' or 'intangible' under the consumer fraud act" (p. 474-475).]

Program Termination

Judges appear sympathetic to students who are confronted with abrupt program terminations, but seldom order extraordinary relief to those aggrieved. [*See Galton v. College of Pharmaceutical Sciences of Columbia University* (1972), in which the court examined whether closure of a dental program was arbitrary or predicated on legitimate financial exigency; and *Behrend v. State of Ohio* (1977), in which the court acknowledged an implied contract between students and the institution and ruled that only impossibility of performance would justify closing the school of architecture.] When closure is abrupt, failure to provide adequate notice and assistance to students can result in a judicial order for the refund of tuition. [*American Computer Institute v. State* (2000). See also *Aase v. State, South Dakota Board of Regents* (1987), in which the state supreme court acknowledged the contractual nature of the relationship between students and institutions, but ruled that the contract exists only during the specific term for which tuition was paid. But see *Peretti v. State* (1989), in which sovereign immunity protected the state institution from liability for any implied contract for delivery of a program to enrolled students.]

In the context of program termination, one court cautioned against applying classic contract principles. In reaching its conclusion, the court rejected the application of classic contract theory, but acceded that even if it were applied, the university reserved the right to eliminate programs in the bulletin. Lacking a showing of bad faith, arbitrary action, or insufficient notice given to students, the court saw no reason to force the application of contract principles only to reject them:

> In sum, this court concludes that applying quasi-contract theory to resolving university-student conflicts over an administrative decision to terminate a college or program for financial reasons is the most effective way to avoid injustice to both the university and its students. The judicial inquiry should be directed toward the *bona fides* of the decisionmaking and the fairness of its implementation: whether the institution acted in good faith and dealt fairly with its student body should be the polestar of the judicial inquiry. This approach will give courts broader authority for examining university decisionmaking in the

administrative area than would a modified standard of judicial deference and will produce a more legally cohesive body of law than will application of classic contract doctrine with its many judicially created exceptions, varying as they must from jurisdiction to jurisdiction. [*Beukas v. Farleigh Dickinson University* (1991), p. 784]

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COMPENSATORY EDUCATIONAL SERVICES: A NEW FORM OF RELIEF

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This presentation provides a comprehensive and concise canvassing of the case law concerning compensatory educational services under the Individuals with Disabilities in Education Act ("IDEA"). This outline includes a limited, secondary sampling of related primary sources, such as hearing/review officer decisions[1] and, only to illustrate the overlapping coverage of Section 504, Office for Civil Rights (OCR) letters of findings.[2] For a more detailed treatment, see the successive articles in WEST'S EDUCATION LAW REPORTS.[3]

A. BACKGROUND CONCEPTS

1. definition: in-kind special education and other related services for denials of a free and appropriate public education ("FAPE")[4]
2. analogy to tuition reimbursement[5]: incomplete[6]

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[1] The citations of hearing/review officer decisions use the designation "SEA," inasmuch as state education agencies are responsible for monitoring IDEA hearing officers and, in two-tier states, review officers.

[2] See *infra* notes 13-14.

[3] Perry Zirkel & M. Kay Hennessy, *Compensatory Educational Services in Special Education Cases*, 150 WEST'S EDUC. LAW REP. 311 (2001); Perry Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 WEST'S EDUC. LAW REP. 483 (1995); Perry Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 WEST'S EDUC. LAW REP. 881 (1991).

[4] *See, e.g.*, Lester H. v. Gilhool, 916 F.2d 865, 868 (3d Cir. 1990)("to restore [the FAPE] that which had been denied him").

[5] *See, e.g.*, Miener v. State of Missouri, 800 F.2d 749, 753 (8th Cir. 1986).

[6] One distinction is that tuition reimbursement requires the parent to prove the appropriateness of their chosen program. *See e.g.*, Carlisle Area Sch. Dist. v. Scott P., 62 F. 3rd 520, 533 (3rd Cir. 1995). For another difference *see infra* note 20.

3. IDEA 1997 Amendments and 1999 Regulations:

- codification, at least in part,[7] of tuition reimbursement remedy[8]
- 3-year statute of limitations for compensatory education claims brought under the state complaint resolution process[9]
- indirect springboard for compensatory education in the discipline context[10]
- other authorized agencies: hearing/review officers,[11] state complaint resolution process,[12] and – under the backup coverage of Section 504 and the ADA[13] – the Office for Civil Rights.[14]

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[7] The Commentary to the regulations seems to suggest that the codification is incomplete, with the authority of hearing/review officers and courts to award tuition reimbursement and compensatory education under *Burlington-Carter* being independent or residual. Attachment 1, 64 Fed. Reg. 12,602 (1999).

[8] 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.403.

[9] 34 C.F.R. § 300.662.

[10] 34 C.F.R. § 300.523(5)(in the first step of the manifestation determination process, requiring districts to "take immediate step to rectify the IEP and placement deficiencies"); *cf.* Community Consol. Sch. Dist. # 93 v. John F., 33 IDELR ¶ 40 (N.D. Ill. 2000).

[11] *See, e.g.*, Harris v. District of Columbia, 19 IDELR 105, 108 (D.D.C. 1992); Cocores v. Portsmouth Sch. Dist, 779 F. Supp. 203, 206 (D.N.H. 1991); Big Beaver Falls Area Sch. Dist. v. Jackson, 19 IDELR 371, 373 (Pa. Commw. Ct. 1992); Letter to Anonymous, 21 IDELR 1061 (OSEP 1994); Letter to Kohn, 17 EHLR 522 (OSEP 1991). *But see* Piermont Sch. Dist., 17 EHLR 310 (N.H. SEA 1991).

[12] See *supra* note 8 and accompanying text; *see also* Letter to Murray, 19 IDELR 496 (OSEP 1992).

[13] *See, e.g.*, Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). For a comprehensive reference, see PERRY ZIRKEL & STEVEN ALEMAN, SECTION 504, THE ADA AND THE SCHOOLS (2000)(LRP Publications).

[14] *See, e.g.*, Chicago (IL) Pub. Sch., EHLR 257:568 (OCR 1984). However, OCR's modern policy is to avoid deciding FAPE and other substantive issues. *See, e.g.*, Westfield (MA) Pub. Sch., 28 IDELR 622 (OCR 1997); Virginia Beach City (VA) Pub. Sch., 26 IDELR 27 (OCR 1996). Thus, such relief is infrequent in published rulings and then in the form of "voluntary" compliance agreements. *See, e.g.*, Ketchikan (AK) Gateway Borough Sch. Dist., 35 IDELR ¶ 67 (OCR 2001); North Royalton (OH) Sch. Dist., 34 IDELR ¶ 46 (OCR 2000); Raytown (MO) S-2 Sch. Dist., 32 IDELR ¶ 72 (OCR 2000); Fayette County (KY) Pub. Sch., 31 IDELR ¶ 111 (OCR 1999); Warren County (VA) Pub. Sch., 20 IDELR 189 (OCR 1993).

Additionally, on rare occasions hearing/review officers address compensatory education awards under Sec. 504. *See, e.g.*, Andover Pub. Sch., 28 IDELR 266 (Mass. SEA 1998).

B. THRESHOLD ISSUES

1. the age 21 barrier[15]: shattered,[16] with a limited and disputed exception[17]
2. Eleventh Amendment immunity: inapplicable[18]

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[15] This ceiling is higher in some state special education statutes. *See, e.g.*, Board of Educ. v. West Virginia Human Rights Comm'n, 385 S.E.2d 637 (W.V. 1989). Conversely, the same principle applies to the ceiling for Part C of the IDEA, which applies to eligible children ages 0-3. *See, e.g.*, Wagner v. Short, 63 F. Supp. 2d 672 (D. Md. 1999).

[16] *See, e.g.*, Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992); Quintana v. Department of Educ., 30 IDELR 503 (P.R. Ct. App. 1998); State ex rel. Justice v. Board of Educ., 539 S.E.2d 777 (W. Va. 2000); *see also* Zirkel 1995, *supra* note 3, at 486; Zirkel 1991, *supra* note 3, at 883-85.

[17] *Compare* Board of Educ. of Oak Park v. Illinois State Bd. of Educ., 79 F.3d 654 (7th Cir. 1996); Hilden v. Lake Oswego Sch. Dist., 21 IDELR 671 (D. Or. 1994)(parents may not pierce the age-21 barrier for services via the stay-put provision), *with* Cosgrove v. Board of Educ., 35 IDELR ¶ 8 (N.D.N.Y. 2001); Appleton Area Sch. Dist. v. Benson, 32 IDELR 91 (E.D. Wis. 2000); Carl B. v. Mundelein High Sch. Dist., 20 IDELR 263 (N.D. Ill. 1993)(stay-put may yield compensatory education).

[18] *See, e.g.*, Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Burr v. Sobol, 888 F.2d 252 (2d Cir. 1989). The express abrogation in the wake of *Dellmuth v. Muth*, 491 U.S. 223 (1989) reinforced this view.

3. statute of limitations or equitable equivalent[19]: variation for successive stages but usually not an effective barrier at the first stage (due process hearing)
   - extended approach - Third Circuit: open-ended for the first and 2 years for the second[20]
   - intermediate position – D. Conn.: 3-6 years for the first period[21]
   - narrow approach – various lower courts: 1-3 years for the first[22] and 30 or 45 days for the second[23]

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[19] *See, e.g.*, Murphy v. Timberlane Reg'l Sch. Dist., 973 F.2d 13, 16 (1st Cir. 1992; Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp. 2d. 807 (E.D. Mich. 1999); K.P. v. Juzwic, 891 F. Supp. 703 (D. Conn. 1995); Unified Sch. Dist. No. 1 v. Connecticut Dep't of Educ., 35 IDELR ¶ 30 (Conn. Ct. App. 2001)(*laches*); *cf.* Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 157 (3d Cir. 1994)(viewable alternatively as limitations period or equities step).

[20] Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 250-51 (3d Cir. 1999). The Third Circuit's failure to limit the first period does not square with its equitable one-year limitations period for tuition reimbursement claims in *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3d Cir. 1994). The court offered a purported distinction in *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996), but it is not clear why a tuition reimbursement award implicates a parental duty of notice while a compensatory education award does not. In any event, in the Third Circuit the length of the initial period, at least for the purposes of calculating compensatory education, is only limited by its starting point, which is when the district knew or should have known of the denial of FAPE, regardless of the parents' knowledge or actions. *See, e.g.*, Kristi H. v. Tri-Valley Sch. Dist., 107 F. Supp.2d 628, 633-34 (M.D. Pa. 2000).

[21] *See, e.g.*, K.P. v. Juzwic, 891 F. Supp. 703 (D. Conn. 1995)(3 or 6 years from the plaintiff's awareness).

[22] Manning v. Fairfax County Sch. Dist., 176 F.3d 235 (4th Cir. 1999)(one-year); Mandy S. v. Fulton Sch. Dist., 31 IDELR ¶ 79 (N.D. Ga. 1999)(two years); Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp. 2d. 807 (E.D. Mich. 1999)(three years); Leake v. Berkeley County Bd. of Educ., 965 F. Supp. 838, 846-47 (N.D.W. Va. 1997)(two years); *cf.* Birmingham v. Omaha Sch. Dist., 220 F.3d 850 (8th Cir. 2000)(three years for § 1983 suits); Strawn v. Missouri State Bd. of Educ., 210 F.3d 954 (8th Cir. 2000)(two years period based on state civil rights, rather than personal injury, statute).

[23] Providence Sch. Dep't v. Ana C., 108 F.3d 1 (1st Cir. 1997)(30 days from the date of receipt, rather than the issuance, of the hearing officer's decision); Wills v Ferrandino, 830 F. Supp. 116 (D. Conn. 1993)(45 days).

3. statute of limitations (cont.):
    - trigger – uniform: when the parents[24] knew or should have known of the denial[25]
    - expanders: tolling based on age[26] or insanity[27]
4. exhaustion doctrine: rather uniform, effective requirement[28]

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[24] In contrast, for the purposes of calculating a compensatory education award, the Third Circuit held that the student's right to compensatory education accrues when the district, not the parents, knew or should have known that the student is not receiving an appropriate education. See *infra* note 37 and accompanying text. The Third Circuit has also taken the view that the period begins to run "once the state administrative process has run its course." Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 280 (3d Cir. 1996).

[25] *See, e.g.*, Richards v. Fairfax County Bd. of Educ., 21 IDELR 832 (4th Cir. 1993); Everett v. Santa Barbara High Sch. Dist., 32 IDELR ¶ 175 (C.D. Cal. 2000); Leake v. Berkeley County Bd. of Educ., 965 F. Supp. 838, 846-47 (N.D.W. Va. 1997); K.P. v. Juzwic, 891 F. Supp. 703, 716 (D. Conn. 1995); Letter to Zimberlin, 34 IDELR ¶ 150, 151 (OSEP 2000).

[26] *Compare* Strawn v. Missouri State Board of Education, 210 F.3d 954 (8th Cir. 2000)(no), *with* Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 220 n.4 (N.D.N.Y. 1993); *cf.* Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992)(§ 504).

[27] Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp. 2d at 816-18 (mental retardation). Another possible exception or expander is the continuing violation doctrine, which has limited applicability in IDEA cases. *See, e.g.*, Everett v. Santa Barbara High Sch. Dist., 32 IDELR ¶ 175 (C.D. Cal. 2000). *But cf.* Garro v. Connecticut, 23 F.3d 734 (2d Cir. 1994).

[28] *See, e.g.*, Urban v. Jefferson, 89 F.3d 720 (10th Cir. 1996); Garro v. Connecticut, 23 F.3d 734 (2d Cir. 1994); Comeaux v. Tangipahoa Parish Sch. Bd., 34 IDELR ¶ 91 (E.D. La. 2001); Porter v. Board of Trustees, 123 F. Supp. 2d 1187 (C.D. Cal. 2000); Amy F. v. Brandywine Heights Area Sch. Dist., 26 IDELR 1286 (E.D. Pa. 1997); McGraw v. Board of Educ., 952 F. Supp. 248 (D. Md. 1997); Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827 (E.D. Pa. 1997); Tanya v. Cincinnati Bd. of Educ., 651 N.E.2d 1373 (Ohio Ct. App. 1995); Kozak v. Hampton Township Sch. Dist., 655 A.2d 641 (Pa. Commw. Ct. 1995). Thus far, the courts have interpreted the established exceptions narrowly in compensatory education cases. *See, e.g.*, Kristi H. v. Tri-Valley Sch. Dist., 107 F. Supp. 2d 628 (M.D. Pa. 2000); Frith v. Galeton Area Sch. Dist., 900 F. Supp. 706 (M.D. Pa. 1995). *But see* Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138 (W.D.N.Y. 1999); Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215 (N.D.N.Y. 1993).

5. mootness doctrine

- possibly a bar when the student has graduated[29]
- not a bar where the student's move is after the alleged denial of FAPE but before the final adjudication of the compensatory-education remedy[30]

C. EVOLVING STANDARDS

1. triggering issues

- threshold level: denial of FAPE must be more than *de minimis*[31] and that it need not be in bad faith,[32] but circuit split whether it need be gross[33]

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[29] *See, e.g.*, Board of Educ. v. Nathan R., 199 F.3d 377 (7th Cir. 2000); Browell v. LeMahieu, 127 F. Supp. 2d 1117 (D. Haw. 2000) (received diploma and the contested services); *cf.* Department of Educ. v. Rodarte, 127 F. Supp. 2d 1103 (D. Haw. 2000)(dismissed, as moot, a school district's appeal from an administrative award of compensatory education where the student had already received the award and graduated from high school; the pending issue of attorneys' fees was an ancillary, separable matter). *But see* Letters to Riffel, 34 IDELR ¶ 291 (OSEP 2000) and 33 IDELR ¶ 188 (OSEP 2000)(not a bar except in absence of need for services); *cf.* Walker County Bd. of Educ., 35 IDELR ¶ 45 (Ala. SEA 2001)(remedy for stay-put, not evaluation).

[30] *See, e.g.*, A.C. v. Independent Sch. Dist. No. 284, 35 IDELR ¶ 59 (8th Cir. 2001); Mandy S. v. Fulton Sch. Dist., 31 IDELR ¶ 79 (N.D. Ga. 1999); Neshaminy Sch. Dist. v. Karla B., 25 IDELR 725 (E.D. PA. 1997); *cf.* Essen v. Board of Educ., 24 IDELR 30 (N.D.N.Y. 1996). *But cf.* Smith v. Special Sch. Dist., 30 IDELR 805 (8th Cir. 1999); Thompson v. Board of Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998)(no jurisdiction if due process hearing not filed before the move).

[31] *See, e.g.*, Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 537 (3d Cir. 1995).

[32] *See, e.g., id.*; Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992); Harris v. District of Columbia, 19 IDELR 105 (D.D.C. 1992); McManus v Wilmette Sch. Dist., 19 IDELR 485 (N.D. Ill. 1992).

[33] *Compare* M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996), *with* Mrs. C. v Wheaton, 916 F.2d 69 (2d Cir. 1990); Butler v. South Glens Falls Sch. Dist., 33 IDELR 3 (N.D.N.Y. 2000); Searles v. Ellenville Cent. Sch. Dist., 29 IDELR 787 (N.D.N.Y. 1999); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 (N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 (2d Cir. 1999); State of Connecticut Unified Sch. Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077, 1081 (Conn. Super. Ct. 1997). Other, older cases relied on the Third Circuit's former, ambiguous view in *Carlisle*. *See, e.g.*, McMillan v. Cheatham County Sch., 25 IDELR 398 (M.D. Tenn. 1997); Yankton v. Schramm, 23 IDELR 42 (D.S.D. 1995), *aff'd on other grounds*, 93 F.3d 1376 (8th Cir. 1996); Attalla City Bd. of Educ., 33 IDELR ¶ 234 (Ala. SEA 2000).

1. triggering issues (cont.)
    - clarification: denial of FAPE may be not just failure to meet the *Rowley* or higher state substantive standard but also via the lack of an IEP,[34] an inadequate IEP,[35] failure to implement the IEP,[36] or a prejudicial procedural violation[37]
2. calculation issues[38]
    - starting point: when the district knew or should have known of the denial of FAPE[39] v. when the parents have actual or constructive knowledge of the denial of FAPE[40]
    - duration: the period of the denial[41]

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[34] Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249-50 (3d Cir. 1999).

[35] *See, e.g.*, Whitehall-Coplay Sch. Dist., 34 IDELR ¶ 254 (Pa. SEA 2001). IEP defects may be considered procedural, substantive, or both. *See, e.g.*, Sanford Sch. Comm. v Mr. & Mrs. L, 34 IDELR ¶ 262 (D. Me. 2001).

[36] *See, e.g.*, Central Bucks Sch. Dist. v. Dara K., 34 IDELR ¶ 235 (Pa. Commw. Ct. 2000).

[37] *See, e.g.*, Amanda J. v. Clark County Sch. Dist., 35 IDELR ¶ 64 (9th Cir. 2001); Birmingham v. Omaha Sch. Dist., 220 F.3d 850, 857 (8th Cir. 2000); Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1994); Board of Educ. v. Illinois State Bd. of Educ., 35 IDELR ¶ 6 (N.D. Ill. 2001); Punxsutawney Area Sch. Dist. v. Kanouff, 663 A.2d 831 (Pa. Commw. Ct. 1995); Walker County Bd. of Educ., 35 IDELR ¶ 45 (Ala. SEA 2001); *cf.* A.C. v. Independent Sch. Dist. No. 284, 35 IDELR ¶ 59 (8th Cir. 2001). *But see* Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1122-23 (9th Cir. 1999); *cf.* Goliad Indep. Sch. Dist., 34 IDELR ¶ 133 (Tex. SEA 2001)(school removals amounted to "essentially procedural violation" w/o lack of progress); South Portland Sch. Dep't, 33 IDELR ¶ 256 (Me. SEA 2000)(various procedural errors including lack of regular education teacher at IEP meeting and failure to provide transition plan but child received meaningful benefit).

[38] It is not unusual for a court to order compensatory education without addressing the specific extent and content of the services. *See, e.g.*, Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 (D. Ariz. 1997). Similarly, all too often it is not at all clear how the hearing/review officer or court calculated the award. *See, e.g.*, Forney Indep. Sch. Dist., 34 IDELR ¶ 215 (Tex. SEA 2001)(108 hours for 1.5 years plus 72 hours for additional .5 year).

[39] M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996).

[40] See *supra* note 25 and the accompanying text.

[41] *Id.* at 397. *See, e.g.*, Stroudsburg Area Sch. Dist. v. Jared M., 712 A.2d 807 (Pa. Commw. Ct. 1998); Bridgeport Bd. of Educ., 28 IDELR 84 (Conn. SEA 1998).

2. calculation issues (cont.)

- exclusion: "the time reasonably required for the school district to rectify the problem"[42]
- extent: need not provide a day-for-day compensation for time missed[43] but particularized (i.e., service-unit) basis[44] or total-package basis[45]?
- effect of changed status: ducked,[46] briefly mentioned[47] or express contingency[48]
- another area of imprecision or confusion: retrospective and prospective FAPE[49]

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[42] 81 F.3d at 397. *See, e.g.*, East Penn Sch. Dist. v. Scott B., 29 IDELR 1058 (E.D. Pa. 1999), *further proceedings*, 30 IDELR 129 (E.D. Pa. 1999); Lower Merion Sch. Dist., 33 IDELR ¶ 139 (Pa. SEA 2000); Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998). On the other hand, the child's incompetency in criminal proceedings does not serve as an exclusion from compensatory education. Unified Sch. Dist. No. 1 v. Connecticut Dep't of Educ., 35 IDELR ¶ 30 (Conn. Ct. App. 2001).

[43] Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994).

[44] *See, e.g.*, D.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 (D. Conn. 1997); Westendorp v. Independent Sch. Dist. No. 273, 35 F. Supp. 2d 1134 (D. Minn. 1998); Quintana v. Department of Educ., 30 IDELR 503 (P.R. Ct. App. 1998); Pittsburgh Bd. of Educ. v. Commonwealth Dep't of Educ., 581 A.2d 681 (Pa. Commw. Ct. 1990); **Desert Sands Unified Sch. Dist., 35 IDELR ¶ 114 (Cal. SEA 2001);** Pleasant Valley Sch. Dist., 35 IDELR ¶ 76 (Cal. SEA 2001); Montgomery County Bd. of Educ., 34 IDELR ¶ 27 (Ala. SEA 2001); Portland Sch. Dist., 30 IDELR 836 (Or. SEA 1999); Taunton Pub. Sch., 27 IDELR 108 (Mass. SEA 1997); Independent Sch. Dist. No. 283, 22 IDELR 47 (Minn. SEA 1994); Philadelphia Sch. Dist., 21 IDELR 320 (Pa. SEA 1994); cf. Brandywine Pub. Sch., 35 IDELR ¶ 81 (Mich. SEA 2001)(specified paraprofessional services to compensate for lack of toilet and computer).

[45] Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572 (Pa. Commw. Ct. 1997).

[46] *See, e.g.*, Lester H. v. Gilhool, 916 F.2d 865, 868 (3d Cir. 1990)("to restore [the FAPE] that which had been denied him").

[47] *See, e.g.*, Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1182 (S.D.N.Y. 1992); *cf.* Hacienda La Puente Unified Sch. Dist., 30 IDELR 105 (Cal. SEA 1999)(to take into account child's learning style, capacity, and IEP goals)..

[48] *See, e.g.*, The Basis Sch., 32 IDELR ¶ 182 (Ariz. SEA 2000).

[49] *See, e.g.*, A.C. v. Independent Sch. Dist. No. 284, 35 IDELR ¶ 59 (8th Cir. 2001); State of Connecticut Unified Sch. Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077, 1081 (Conn. Super. Ct. 1997).

2. calculation issues (cont.)

- effect of the equities:[50] for[51] or against[52] parents' entitlement
- present need: hardly considered[53] and presumed[54]
- effectiveness: not addressed yet

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[50] A review panel recently appeared to reject the role of the equities, not recognizing the analogy from tuition reimbursement. Southeast Delco Sch. Dist., 34 IDELR ¶ 108 (Pa. SEA 2001).

[51] *See, e.g.*, Everett v. Santa Barbara High Sch. Dist., 32 IDELR ¶ 175 (C.D. Cal. 2000).

[52] *See, e.g.*, Moubry v. Independent Sch. Dist. No. 696, 27 IDELR 469 (D. Minn. 1997)(Moubry II); Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489 (9th Cir. 1994); El Paso Indep. Sch. Dist., 34 IDELR ¶ 275 (Tex. SEA 2001); *cf.* Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998)(reduction). The role of the equities in terms of parental conduct is unclear in the Third Circuit. *See, e.g.*, D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457, 537 (D.N.J. 1997), *aff'd mem.* 159 F.3d 1350 (3d Cir. 1998). Quaere: will the language in IDEA 97 delineating the potential significant effect of unreasonable parental conduct in tuition reimbursement cases increase the role of this equitable factor in compensatory services cases in the Third Circuit and more generally?

[53] *See, e.g.*, Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994). Similarly, the Office of Special Education Programs (OSEP), which administers IDEA at the federal level, recently opined that a student's graduation with a regular high school diploma does not relieve a school district of its obligation to remedy a previous denial of FAPE with compensatory education except "in the absence of the need for [such] services." Letter to Riffel, 33 IDELR ¶ 188 (OSEP 2000). However, in response to a request for clarification, OSEP did not explain what it meant by this exception. Letter to Riffel, 34 IDELR ¶ 292 (OSEP 2000).

[54] *See, e.g.*, Central Bucks Sch. Dist. v. Sara K., 34 IDELR ¶ 235 (Pa. Commw. Ct. 2000); *cf.* Sanford Sch. Comm. v. Mr. and Mrs. L., 34 IDELR ¶ 262 (D. Me. 2001)(proportional to harm); Unified Sch. Dist. No. 1 v. Connecticut Dep't of Educ., 35 IDELR ¶ 30 (Conn. Ct. App. 2001)(regardless of regression where lack of IEP implementation).

3. scope issues

   - lower limit: child in a permanent vegetative state[55]

   - upper limit: postsecondary education?[56]

4. implementation issues

   - awards of both compensatory education and tuition reimbursement for the same period of denied FAPE[57]: questionable[58]

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[55] *See, e.g.*, Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [122 Ed.Law Rep. [434]] (N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 (table), 32 IDELR ¶ 64(text) (2d Cir. 1999). Unlike *Timothy W. v. Rochester School District*, 875 F.2d 954 (1st Cir. 1989), which established the prospective FAPE obligation for "all" eligible children, including those whose cognitive capability is negligible, this court deferred to the hearing and review officers' findings that there was no evidence that the child had regressed as a result of the district's failure to provide FAPE.

[56] *See, e.g.*, Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138 (W.D.N.Y.1999)(preliminary injunction for college tuition as a permissible form of compensatory education at a college, where the courses would be used toward a high school diploma, rather than for a college degree); Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992)(ordered compensatory program taking into account his educational status at the time of graduation and progress in the interim – not tuition but may be while attending college); Puffer v. Raynolds, 761 F. Supp. 838 (D. Mass. 1988)(awarded tutoring to student at community college), Bean v. Conway Sch. Dist., 18 IDELR 65 (D.N.H. 1991)(denied where no showing of requisite denial of FAPE), Brownsville Area Sch. Dist. v. Student X, 729 A.2d 198 (Pa. Commw. Ct. 1999)(reversal, under state law covering gifted students, of an award of 1,954 hours of compensatory services for college-level instruction, private tutoring, and other education beyond the curricular offerings of the district); R.S. v. Cinnaminson Township Bd. of Educ., 26 IDELR 1378 (N.J. SEA 1997)(tutoring plus writing and remedial reading courses at community college); *cf.* Letter to Kohn, 17 EHLR 522 (OSEP 1991)("should not impose obligations that would go beyond entitlement"). OSEP recently opined that "the compensatory education must be the type of educational and related services that are part of elementary and secondary school education offered by the State," thus precluding an award at the postsecondary level "unless such serives also would be considered elementary and secondary school education in [that state]." Letter to Riffel, 34 IDELR ¶ 292 (OSEP 2000).

[57] *See, e.g.*, Linda W. v. Indiana Dep't of Educ., 200 F.3d 504 (7th Cir. 1999); Rome Sch. Comm. v. Mrs. B., 32 IDELR 33 (D. Me. 2000); Board of Educ. v. Illinois State Bd. of Educ., 28 IDELR 1175 (N.D. Ill. 1998); Hot Springs Sch. Dist., 33 IDELR ¶ 20 (Ark. SEA 2000); Conejo Valley Unified Sch. Dist., 33 IDELR ¶ 170 (Cal. SEA 2000); Goleta Union Elem. Sch. Dist., 31 IDELR 231 (Cal. SEA 1999); *In re* Student with a Disability, 27 IDELR 1077 (Tenn. SEA 1997); Pasadena Indep. Sch. Dist., 26 IDELR 690 (Tex. SEA 1997).

[58] However, as an exception, a hearing/review officer or court may, depending on the equities, grant compensatory education in lieu of part or all of tuition reimbursement relief. *See, e.g.*, Nein v. Greater Clark County Sch. Corp., 32 IDELR ¶ 171 (S.D. Ind. 2000).

4. implementation issues (cont.)

- awards of tuition reimbursement as a form of compensatory education: similarly questionable[59]
- when: after school, during the summer, or at some other time "beyond what is required by [his prospective] IEP"?[60]
- where: private school?[61]
- who: hearing officer[62]? outside expert[63]? mutual agreement or IEP team[64]? or the parents[65]?

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[59] The reason is that it bypasses the requirement that the parent prove the appropriateness of the placement. *See, e.g.*, Salem Community High Sch. Dist. No. 600,34 IDELR ¶ 131 (Ill. SEA 2001); Montgomery County Pub. Sch., 31 IDELR ¶ 70 (Md. SEA 1999); Dripping Springs Indep. Sch. Dist., 25 IDELR 564 (Tex. SEA 1997); Barnesville Exempted Village Sch. Dist., 26 IDELR 1363 (Ohio SEA 1997). *But cf.* R.S. v. Cinnaminson Township Bd. of Educ., 26 IDELR 1378 (N.J. SEA 1997)(specifically determined to be "the most reasonable method" in this case).

[60] Stroudsburg Area Sch. Dist., 27 IDELR 975, 977 (Pa. SEA 1997), *aff'd*, Stroudsburg Area Sch. Dist. v. Jared M., 712 A.2d 807 (Pa. Commw. Ct. 1998). OSEP opined that such awards could be during the summer. Letter to Kohn, 17 EHLR 522 (OSEP 1991).

[61] *See, e.g.*, A.C. v. Independent Sch. Dist. No. 284, 35 IDELR ¶ 59 (8th Cir. 2001); Brantley v. Independent Sch. Dist. No. 625, 936 F. Supp. 649, 655 (D. Minn. 1996), *further proceedings*, 26 IDELR 839 (D. Minn. 1997).

[62] *See, e.g.*, Independent Sch. Dist. No. 281, 33 IDELR ¶ 265 (Minn. SEA 2000). The hearing officer ordered the parties to submit their proposals to her within ten days if they did not agree on the structuring of the 200-hour award, which was based on loss of FAPE for more than a year but the calculation was not explained. The procedure of retaining jurisdiction for implementation of the remedy is questionable in light of the finality principle of the IDEA.

[63] *See, e.g.*, Hot Springs Sch. Dist., 33 IDELR ¶ 20 (Ark. SEA 2000); Keystone Cent. Sch. Dist., 33 IDELR ¶ 264 (Pa. SEA 2000). *But cf.* State v. Board of Educ. of Monongalia County, 33 IDELR ¶ 186 (W. Va. 2000).

[64] *See, e.g.*, State of Connecticut Unified Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 (Conn. Super. Ct. 1997); Hacienda La Puente Unified Sch. Dist., 30 IDELR 105 (Cal. SEA 1999); Lower Merion Sch. Dist., 33 IDELR ¶ 139 (Pa. SEA 2000); Spring-Ford Area Sch. Dist., 27 IDELR 1083 (Pa. SEA 1997); Elizabethtown Area Sch. Dist., 25 IDELR 353 (Pa. SEA 1996); *cf.* Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992); Walker County Bd. of Educ., 35 IDELR ¶ 45 (Ala. SEA 2001)(ordered parents and school authorities to develop the compensatory program); Upper Darby Sch. Dist., 26 IDELR 1183 (Pa. SEA 1997)(content of the award left to mutual agreement but the time of the award, such as after school or in the summer, left to the parents).

[65] *See, e.g.*, Whitehall-Coplay Sch. Dist., 34 IDELR ¶ 254 (Pa. SEA 2001); Northern Lebanon Sch. Dist., 34 IDELR ¶ 215 (Pa. SEA 2001); In re Ben R., Special Educ. Opinion No. 1102 (Pa. SEA 2001)(available at www.pattan.k12.pa.us/isp/odr); Philadelphia Sch. Dist., 33 IDELR ¶ 259 (Pa. SEA 2000); *cf.* East Allegheny Sch. Dist., 29 IDELR 662 (Pa. SEA 1998); Elizabethtown Area Sch. Dist., 25 IDELR 353 (Pa. SEA 1996).

4. implementation issues (cont.)

- what: same or different?[66] escrow fund?[67]
- final possible problem: awards that are too vague to be enforceable[68] or that are sufficiently clear but not implemented[69]

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[66] *See, e.g.*, Northern Lebanon Sch. Dist., 34 IDELR ¶ 216 (Pa. SEA 2001): "any appropriate developmental, remedial, therapeutic or enriching instruction that furthers the goals of [the child's] pendent or future IEPs" and that "may not be substituted for special education and related services that are, or should be, included in [the child's] IEP."

[67] *See, e.g.*, Marple Newtown Sch. Dist., 33 IDELR ¶ 115 (Pa. SEA 2000). However, the second-tier panel reversed this decision. In re John A., Special Educ. Opinion No. 1054 (September 27, 2000)(available at www.pattan.k12.pa.us/isp/odr); *see also* Lower Merion Sch. Dist., 33 IDELR ¶ 139 (Pa. SEA 2000). In contrast, a separate court decision was limited to the reasonableness of the rate for compensatory education services. Brad J. v. Commonwealth Dep't of Educ., 22 IDELR 712 (E.D. Pa. 1995).

[68] *See, e.g.*, School Bd. of Osceola County v. M.L, 30 IDELR ¶ 650 (M.D. Fla. 1999).

[69] *See, e.g.*, Murphy v. Timberlane Reg'l Sch. Dist., 855 F. Supp. 498 (D.N.H. 1994).

SCHOOL UNIFORMS: CAN VOLUNTARY PROGRAMS WORK? EXPERIMENTING IN AN AT-RISK SCHOOL

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Topic Session F-4

School Uniforms: Can voluntary programs work? Experimenting in an at-risk school

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Summary:

Implications regarding attendance and student discipline will be reported following the adoption and implementation for one year of a voluntary uniform policy at an at-risk middle school.

Description:

Recently, a principal in the Washoe County School District (Reno-Lake Tahoe) gained board permission (rather than official approval) to begin a voluntary school uniform policy in an at-risk middle school with an extremely high transiency rate. Parents overwhelmingly supported the concept, exceeding the board's mandatory 90 percent approval level. Without a financial commitment from the district, the principal received corporate and private party funding for the purchase of uniforms for students who could not afford them, as required by state statute.

Research used by the principal and presented to parents and the school board verifying the successes of voluntary uniform policies in schools will be discussed. The presentation will also examine successes and failures of non-voluntary (mandatory) programs along with the outcome of legal challenges by parents.

Interested participants for this session would include school administrators, attorneys, and professors.

Narrative:

Research has consistently recognized a strong relationship between economic disadvantage and low norm-referenced test scores. Many schools with low academic achievement scores, low attendance rates, and high transiency percentages have high rates of students eligible for free or reduced lunches which researchers frequently use as a poverty indicator.[1] Similarly, studies have found that the strongest predictor of school crime is the nature of the surrounding community, i.e., communities with high levels of poverty and crime tend to have schools with high levels of crime.[2]

In the Washoe County Schools, which include the cities of Reno, Sparks, and a portion of Lake Tahoe, one of the middle schools fitting the above socioeconomic profile has been working, not only to overcome such perceived obstacles, but to strive for excellence. Led by Principal Debbie Feemster, the faculty, staff, and students at Traner Middle School have already improved reading scores on the norm-referenced TerraNova examinations. Truancy rates and the number of school suspensions have also declined with the implementation of a peer mediation program, family liaisons, and a family focus center.[3]

In an effort to further enhance academic and social goals, the school's parent/teacher organization discussed, researched, and voted to pilot a school uniform program commencing November 2000. School officials used a variety of research studies and a manual published by the U.S. Department of Education which notes that "A safe and disciplined learning environment is the first requirement of a good school."[4] The manual stresses the importance of parental support and states that in recent years the strongest push for school uniforms has been initiated by parent groups--such as Traner's--seeking improved school safety.

Often school uniforms are less expensive than the clothing that students typically wear to school. Nonetheless, the cost of purchasing a uniform may be a burden on some families. Districts planning to institute a uniform policy should address this issue prior to implementation. Grants of assistance have been available from federal or state agencies and from private sources, and graduates typically donate their uniforms to the school.

School leaders and other stakeholders must decide whether to have a voluntary or mandatory school uniform policy. About 60 percent of schools adopting uniform plans have opted for mandatory policies, while about 40 percent have voluntary programs.

Voluntary policies are usually implemented by parental consensus through local PTAs or PTOs. Parents are not required to dress their children in uniforms, despite the fact that the policy recommends them. Under voluntary programs, schools are not required to buy uniforms for students whose parents cannot afford them but most opt to do so. If children do not wear uniforms, they will not be reprimanded. A voluntary policy involves few legal issues.

Mandatory programs are usually implemented by a board of education or a similar administrative authority. Students are required to wear uniforms, although some exceptions--usually involving religious reasons--can be made. When parents cannot afford uniforms, most schools supply them. According to the general counsel of the National Association of Secondary School Principals, "Clothing requirements are not considered a violation of their freedom of expression if there's a valid educational reason for imposing them."[5]

The many perceived benefits of adopting a school uniform policy are summarized in the following eclectic listing:

School safety.

- Decreased violence and theft.
- The identification of nonstudent intruders.
- Prevention of gang attire.

School attendance.

- Less embarrassment over clothing could increase attendance.
- The safer the school, the more likely students will attend.

Academic performance.

- Increased attention on academics (less on clothing).
- Higher expectations from teachers.

Social benefits.

- Uniforms may promote a sense of community and camaraderie.
- School uniforms lessen the difference between rich and poor.
- Less fashion-conscious school environment.
- Reduction in clothing-related peer conflict.

Preparation for the future.

- Uniforms can prepare students for work world where expectations are greater.
- Uniforms create a sense of "teamwork."
- Students are more likely to have a businesslike attitude.

School administrator benefits.

- More time spent on instructional leadership.
- Less time spent on clothing-related conflicts.

Parental benefits.

- Eliminating the discussion over what to wear to school.
- Uniforms promote efficiency and organization.
- Less pressure from children to purchase trendy, high-priced clothing.

To gain firsthand experience and knowledge, Traner's principal visited a successful mandatory school uniform program in Long Beach, California, which reportedly had achieved a 70 percent reduction in student discipline incidents.

Officials at Traner gained the support of over 90 percent of the parents and nearly the entire school population for a voluntary uniform program with the following goals:

- Increase school safety
- Increase attendance
- Identify non-students more readily
- Decrease the theft of clothing
- Prevent gang-related attire

The school district did not officially endorse or fund the pilot program and Traner officials were therefore faced with working out such details as locating a low-priced uniform that would be popular with students and finding a source of funding to purchase uniforms for students who could not afford them.

Students were given the opportunity to participate in the uniform selection process, choosing tops in either of their school colors (red or white) and khaki-colored pants, skorts, or shorts. The school benefitted when a large discount store offered to individually size each student and order the uniforms–and at a greatly discounted rate. For example, students were able to purchase pants retailing for $20 for $12.50. Tops and lined windbreakers with the school logo were sold for $14.00 and $22.00, respectively. For the initial year of the pilot program, students were allowed to choose their own footwear, with white basketball shoes being recommended. Fridays were "casual days" and students could dress at their own discretion (as long as appropriate).

The fund for purchasing uniforms for students who couldn't afford them was quickly established with monetary gifts from a number of unsolicited sources, including some out-of-district donors. The school also purchased washers and dryers so students could do their own laundry and received a grant to transport students staying late for homework or laundry duties.

According to the principal, at the plan's inception the majority of students and about 70 percent of the faculty and staff wore uniforms, but as the school year ended, voluntary participation by students had dropped to about 50 percent. Although many of the goals of the uniform policy were at least partially successful, Ms. Feemster's recommendation was the official adoption of a mandatory program by the school board.

Research regarding the effectiveness of school uniform implementation remains inconclusive. Supported by studies which indicate that school uniforms have little influence in reducing delinquency or gang activity,[6] parents of a few students in districts with mandatory school uniform dress codes have challenged such policies in court. Schools which have adopted policies with the stated purpose of improving the quality of education have thus far prevailed as courts are apparently willing to permit at-risk schools, like Traner, to pilot programs aimed at providing a "safe and disciplined learning environment."[7]

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7. See, for example, *Canady v. Bossier Parish School Board* 240 F.3d 437 (5th Cir. 2001), highlighted in March 2001 *School Law Reporter*, Education Law Association (Vol. 43, No. 3).

Legal Decisions Regarding Student Dress Notes

According to a recent federal circuit court decision (*Canady v. Bossier Parish School Board* 240 F.3d 437 (5th Cir. 2001)), the issue of upholding school policies that mandate the wearing of uniforms does not directly relate to any of the three categories of First Amendment student speech regulation established by the U.S. Supreme Court:

1. Regulating specific student viewpoints.

   When officials attempt to restrict students from expressing particular political views, they must demonstrate that the expression would "substantially interfere with the work of the school or impinge upon the rights of other students" (*Tinker v. Des Moines*, 393 U.S. 503 at 509, 1969).

2. Regulating offensive speech.

   It is appropriate for educators to protect students from sexually explicit, indecent, or lewd speech (*Bethel v. Fraser*, 478 U.S. 675, 1986). The speech in *Bethel* was unrelated to political viewpoint.

3. Regulating student expression related to school-sponsored activity.

   The U.S. Supreme Court concluded that the *Tinker* analysis does not apply when "the First Amendment requires a school affirmatively to promote particular student speech." After determining that schools were not traditional public forums for First Amendment activity, the Court held that school officials could regulate school-sponsored activities such as publications, theatrical productions, and any other conduct related to the school's curriculum if "their actions are reasonably related to legitimate pedagogical concerns" (*Hazelwood v. Kuhlmeier*, 484 U.S. 260 at 270-73, 1988). The Court further noted that school boards, not federal courts, have the authority to decide what constitutes appropriate behavior and dress in public schools (*Id.* at 267).

The *Canady* decision examined whether clothing choice was protected under the U.S. Supreme Court's expressive conduct analysis in *Spence v. Washington*, 418 U.S. 405, 1974; *Texas v. Johnson*, 491 U.S. 397, 1989; and *United States v. O'Brien*, 391 U.S. 367, 1968. Quoting *O'Brien* (at 377), the court-noted that "the school board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."

The district presented credible statistical evidence that during a trial period in which some of the schools within the district had implemented a one-year mandatory uniform policy, tests scores increased and discipline incidents drastically decreased in those schools. The court noted that students were still free to wear clothing of their choice after school hours, could "express their views through other mediums" during the school day, and the uniform policy did not bar important "personal intercommunication among students" (referenced in *Tinker*).

Appellants also presented a "liberty" rights challenge under the Fourteenth Amendment but the court cited several cases which held that due process arguments should not be used as a fallback strategy when issues are directly addressed under the First Amendment.

According to the court, the financial issue of the provision of uniforms to less affluent students was adequately addressed by school policy, "The school board has provided evidence that school uniforms are donated by organizations to the less fortunate. Because uniforms are available at inexpensive retail stores, it is hard to imagine how the purchase of uniforms consisting of a certain color of shirt and pants could be any more expensive than the normal cost of a student's school clothes."

State Law Considerations

Nevada – No Opt-Out

Public school districts may adopt policies requiring students to wear uniforms and/or teachers to follow dress codes. Nevada Revised Statutes (NRS) Chapter 392.458 (1997) reads as follows:

1. The board of trustees of a school district may, in consultation with the schools within the district, parents and legal guardians of pupils who are enrolled in the district, and associations and organizations representing licensed educational personnel within the district, establish a policy that requires pupils to wear school uniforms.
2. The policy must:
   (a) Describe the uniforms;
   (b) Designate which pupils must wear the uniforms; and
   (c) Designate the hours or events during which the uniforms must be worn.
3. If the board of trustees of a school district establishes a policy that requires pupils to wear school uniforms, the board shall facilitate the acquisition of school uniforms for pupils whose parents or legal guardians request financial assistance to purchase the uniforms.
4. The board of trustees of a school district may establish a dress code enforceable during school hours for the teachers and other personnel employed by the board of trustees.

California – Opt-Out

California School Uniform Law (California Education Code, Section 35183)

1. The children of this state have the right to an effective public school education. Both students and staff of the primary, elementary, junior and senior high school campuses have the constitutional right to be safe and

secure in their persons at school. However, children in many of our public schools are forced to focus on the threat of violence and the messages of violence contained in many aspects of our society, particularly reflected in gang regalia that disrupts the learning environment.

2. "Gang-related apparel" is hazardous to the health and safety of the school environment.
3. Instructing teachers and administrators on the subtleties of identifying constantly changing gang regalia and gang affiliation takes an increasing amount of time away from educating our children.
4. Weapons, including firearms and knives, have become commonplace upon even our elementary school campuses. Students often conceal weapons by wearing clothing, such as jumpsuits and overcoats, and by carrying large bags.
5. The adoption of a school-wide uniform policy is a reasonable way to provide some protection for students. A required uniform may protect students from being associated with any particular gang. Moreover, by requiring school-wide uniforms, teachers and administrators may not need to occupy as much of their time learning the subtleties of gang regalia.
6. To control the environment in public schools to facilitate and maintain an effective learning environment and to keep the focus of the classroom on learning and not personal safety, schools need the authorization to implement uniform clothing requirements for our public school children.
7. Many educators believe that school dress significantly influences pupil behavior. This influence is evident on school dress-up days and color days. Schools that have adopted school uniforms experience a "coming together feeling," greater school pride, and better behavior in and out of the classroom.

b) The governing board of any school district may adopt or rescind a reasonable dress code policy that require pupils to wear a school-wide uniform or prohibits pupils from wearing "gang-related apparel" if the governing board of the school district approves a plan that may be initiated by an individual school's principal, staff, and parents and determines that the policy is necessary for the health and safety of the school environment. Individual schools may include the reasonable dress code policy as part of its school safety plan, pursuant to Section 35294.1.

c) Adoption and enforcement of a reasonable dress code policy pursuant to subdivision (b) is not a violation of Section 48950. For purposes of this section, Section 48950 shall apply to elementary, high school, and unified school districts. If a school-wide uniform is required, the specific uniform selected shall be determined by the principal, staff, and parents of the individual school.

d) A dress code policy that requires pupils to wear a school-wide uniform shall not be implemented with less than six months' notice to parents and the availability of resources to assist economically disadvantaged pupils.

e) The governing board shall provide a method whereby parents may choose not to have their children comply with an adopted school uniform policy.

f) If a governing board chooses to adopt a policy pursuant to this section, the policy shall include a provision that no pupil shall be penalized academically or otherwise discriminated against nor denied attendance to school if the pupil's parents chose not to have the pupil comply with the school uniform policy. The governing board shall continue to have responsibility for the appropriate education of those pupils.

g)A policy adopted pursuant to this section shall not preclude pupils that participate in a nationally recognized youth organization from wearing organization uniforms on days that the organization has a scheduled meeting.

Model Schools (cited in the U.S. Department of Education, "Manual on School Uniforms," 1998)

Mandatory Programs

Long Beach, California

Type: Uniforms are mandatory in all elementary and middle schools. Each school in the district determines the uniform its students will wear.

Opt-out: Yes, with parental consent

Size of program: 58,500 elementary and middle school students

Implementation date: 1994

Support for disadvantaged students: Each school must develop an assistance plan for families that cannot afford to buy uniforms. In most cases, graduating students either donate or sell used uniforms to needy families.

Results: District officials found that in the year following implementation of the school uniform policy, overall school crime decreased 36 percent, fights decreased 51 percent, sex offenses decreased 74 percent, weapons offenses decreased 50 percent, assault and battery offenses decreased 34 percent, and vandalism decreased 18 percent. Fewer than one percent of the students have elected to opt out of the uniform policy.

Dick Van Der Laan of the Long Beach Unified School District explained, "We can't attribute the improvement exclusively to school uniforms, but we think it's more than coincidental." According to Long Beach police chief William Ellis, "Schools have fewer reasons to call the police. There's less conflict among students. Students concentrate more on education, not on who's wearing $100 shoes or gang attire."

Seattle, Washington

Type: Mandatory uniform policy at South Shore Middle School

Opt-out: Yes, with parental consent. Students who opt out must attend another middle school in the district.

Size of program: 900 middle school students

Implementation date: 1995

Support for disadvantaged students: South Shore works with local businesses that contribute financial support to the uniform program. In addition, the administration at South Shore found that the average cost of clothing a child in a school with a prescribed wardrobe is less than in schools without such a program, sometimes 80 percent less. School officials believe that durability, reusability and year-to-year consistency also increase the economy of the school's plan.

Results: The principal of South Shore, Dr. John German, reports that "this year the demeanor in the school has improved 98 percent, truancy and tardies are down, and we have not had one reported incident of theft." Dr. German explains that he began the uniform program because his students were "draggin', saggin' and laggin'. I needed to keep them on an academic focus. My kids were really into what others were wearing." Only five students have elected to attend another public school.

Kansas City, Missouri

Type: Mandatory uniform policy at George Washington Carver Elementary School

Opt-out: None. Carver is a magnet school to which parents and students apply knowing about the uniform policy.

Size of program: 320 elementary school students

Implementation date: 1990

Support for disadvantaged students: Students receive their uniforms at no cost to them. The state and school district pay for the uniforms primarily with magnet school funding.

Results: Philomina Harshaw, the principal for all six years that Carver has had uniforms, observed a new sense of calmness throughout the school after students began wearing uniforms. "The children feel good about themselves as school uniforms build a sense of pride. It forces adults to know a child."

Norfolk, Virginia

Type:	Mandatory uniform policy at Ruffner Middle School
Opt-out:	None. Students who come to school without a uniform are subject to in-school detention.
Size of program:	977 middle school students
Implementation date:	1995

Support for disadvantaged students: The school provides uniforms for students who cannot afford them.

Results: Using U.S. Department of Education software to track discipline data, Ruffner has noted improvements in students' behavior. Leaving class without permission is down 47 percent, throwing objects is down 68 percent and fighting has decreased by 38 percent. Staff attribute these changes in part to the uniform code.

Phoenix, Arizona

Type:	Mandatory uniform policy at Phoenix Preparatory Academy
Opt-out:	Yes, with parental consent. Students who opt out must attend another middle school in the district.
Size of program:	1,174 middle school students
Implementation date:	1995

Support for disadvantaged students: A grant from a local foundation covers the $25 to $30 cost of uniforms for families that cannot afford to buy them.

Results: According to the principal, Ramon Leyba, "The main result is an overall improvement in the school climate and a greater focus on positive behavior. A big portion of that is from uniforms."

Voluntary Programs

Richmond, Virginia

Type: Voluntary uniform policy at Maymont Elementary School for the Arts and Humanities

Opt-out: Uniforms are voluntary.

Size of program: 262 elementary school students

Implementation date: 1994

Support for disadvantaged students: Responding to parent concerns about the cost of uniforms, the school sought community financial support for the uniform program. Largely as a result of financial donations from businesses and other community leaders, the percentage of students wearing uniforms rose from 30 percent in 1994-95, the first year of the program, to 85 percent during the current year.

Results: Maymont principal Sylvia Richardson identifies many benefits of the uniform program, including improved behavior, an increase in attendance rates and higher student achievement.

Memphis, Tennessee

Type: Voluntary uniform policy at Douglas Elementary School

Opt-out: Uniforms are voluntary.

Size of program: 532 elementary school students

Implementation date: 1993

Support for disadvantaged students: Douglas has business partners in Memphis that have contributed financial support to purchase uniforms for needy families.

Results: According to Guidance Counselor Sharon Carter, "The tone of the school is different. There's not the competitiveness, especially in grades, 4, 5, and 6, about who's wearing what." Ninety percent of the students have elected to wear uniforms on school uniform days, Monday through Thursday. Fridays are "casual" days during which none of the students wear uniforms.

Baltimore, Maryland

Type:	Voluntary uniform policy at Mt. Royal Elementary/Middle School
Opt-out:	Uniforms are voluntary.
Size of program:	950 elementary and middle school students
Implementation date:	1989

Support for disadvantaged students: Mt. Royal Elementary/Middle School keeps a store of uniforms that are provided free to students who cannot afford the $35.00 to purchase them. Ninety-eight percent of graduating eighth graders donate their uniforms to the school.

Results: According to Mt. Royal's assistant principal, Rhonda Thompson, the uniform policy "has enhanced the tone and climate of our building. It brings about a sense of seriousness about work." All of the students have elected to participate in the uniform program.

WHO CONTROLS THE CURRICULUM?: A CASE FOR REASSERTING THE AUTHORITY OF THE LOCAL SCHOOL BOARD

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"***Curriculum, n.*** A course of study in a school."[1]

"A classic is something that everybody wants to have read and nobody wants to read." --Mark Twain[2]

I. Introduction

With the school accountability movement in full swing across the country, government and education officials at the national, state, and local levels have begun to focus like never before on student test results. Yet sole, or primary, emphasis on the outcomes of examinations may cause policymakers to overlook two critical questions in school reform: 1) What is the curriculum, and 2) who should control it?

Regarding the first question, it has been suggested that there are in effect at least four curricula: "the official, the taught, the learned, and the tested."[3] Certainly the law plays a key role in determining the "official" curriculum and the "tested" curriculum, both of which may be evolving into one and the same. Yet with the courts now being called upon to decide disputes over everything from textbooks to classroom movies, even the "taught" and the "learned" curricula are subject to legal parameters.

The answer to the second question is also largely determined by the law, and is pivotal to school change, for those who control the curriculum are those who define and implement it. School curriculum has been described as a "net pulled by a crowd in many directions," [4]and those who are able to pull hardest, especially with the force of law behind them, exert power over many aspects of the modern school's academic core.

This paper will discuss recent trends in the law shaping curriculum governance, with an emphasis on developments that are challenging the curricular authority of local school boards and causing power over the curriculum to shift toward state and federal officials. After surveying the current landscape, the authors will suggest some ways that local school boards might begin to reclaim their ability to influence curriculum policy.

II. "Official" Curriculum and the Rising Power of the States

Interestingly, the changing role of the states in curriculum policy was noted nearly 20 years ago by Professor Michael Kirst of Stanford University, who observed:

> According to the national reports of 1983-84, local school officials caused the current crisis in education by allowing academic standards to drop; they "unilaterally educationally disarmed" the nation. State legislators have been told that the federal government will not play a major role in funding responses to this crisis. State reaction has been intense and pervasive. The 1983-84 meetings of the National Governors Association were dominated by issues of education reform. State legislative agendas are replete with six- or eight-point plans by major state authorities for educational improvement. Statewide business groups have formed task forces for state action. With over 200 high-level state commissions studying the quality of education in 1983-84, it is

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[1] **Webster's New World Dictionary** 149 (Warner Books Paperback Ed. 1990).

[2] James Charlton, **A Little Learning is a Dangerous Thing** 20 (1994).

[3] Larry Cuban, Please, No More Facts: Just Better Teaching, **Education Week**, Mar. 11, 1992, at 40.

[4] Michael W. Kirst, **Who Controls Our Schools?** 111 (1984).

> not unusual for the state legislature, the governor, and the chief state school officers to have separate commissions.
>
> . . .
>
> The new state initiatives are aimed at the core of instructional policy: what should be taught, how it should be taught, and who shall teach. State reformers no longer want to stop at the classroom door. They believe they must influence the content and style of instruction within that classroom if reforms are to take root.[5]

This power surge at the state level was initiated by several politicians who doggedly pursued overhauls of content standards and assessments in their states. On the West Coast, California State Superintendent of Public Instruction Bill Honig recognized that because of the large numbers of textbooks it purchases, his state could, and should, have a major impact on curriculum and standards. Therefore, he "brought together panels of teachers and scholars to rewrite the state's curriculum frameworks, which serve as guidelines for textbook publishers."[6]

In the Southeast, a small group of governors, who became known as the nation's first "education governors," led the charge to reform schools by insisting on curricular standards and requiring students to produce evidence of ability to meet such standards. According to Diane Ravitch, this cohort of governors, which included Lamar Alexander of Tennessee, Richard Riley of South Carolina, and Bill Clinton of Arkansas, envisioned a significant role for state government in curriculum planning:

> The organizing principle of this new state-based movement was that the focus of reform should be on results, rather than on process or inputs, and that states should press for higher educational achievement while reducing regulations and other procedural burdens on schools. In 1986, Governors Alexander, Clinton, and Riley worked together on a report for the National Governors' Association, titled *Time for Results*; on behalf of the other governors, Lamar Alexander wrote that "the Governors are ready for some old fashioned horse-trading. We'll regulate less, if schools and school districts will produce better results." Thus, the governors most actively involved in state-level reforms moved to identify standards, by which they meant *what students should know and be able to do*, and to develop assessments to provide information about whether students were making progress toward the standards.[7]

From these beginnings, states across the United States have dramatically increased their control over the curriculum during the past fifteen years. State power over the curriculum now stems from a variety of different sources, including state legislatures, governors' offices, and state courts.

As a result of both legislation and the regulatory power with which they are bestowed, most state boards of education have long wielded considerable curricular authority. For example, the South Carolina Code grants the State Board of Education the power to "[p]rescribe and enforce courses of study for the free public schools," and to "[p]rescribe and enforce the use of textbooks and other instructional materials for the various subjects taught or used in conjunction with the free public schools of the State."[8] Pursuant to this authority, the State Board has promulgated regulations mandating curriculum for K-5, [9] 6-8,[10] and 9-12,[11] as well as comprehensive graduation requirements for all students.[12]

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[5] *Id.* at 129.

[6] Diane Ravitch, The Search for Order and the Rejection of Conformity: Standards in American Education, in **Learning from the Past** 167, 180 (Diane Ravitch & Maris A. Vinovskis eds., 1995).

[7] *Id.* at 181.

Similarly, the Utah Code stipulates that the State Board of Education "shall establish rules and minimum standards for the public schools," to include in part, "curriculum and instruction requirements."[13] Thus, the Utah State Board has enacted regulations that set forth the Utah "core curriculum" for all elementary and secondary school students, as well as high school graduation requirements.[14]

A more recent development , as noted above, is the rising power of governors in matters of curriculum and instruction. Several states, including South Carolina, are currently contemplating governance changes that would give governors much more direct influence in the affairs of public schools. Among the changes being considered are: 1) giving the governor power to appoint the entire state school board (Florida); and 2) allowing the governor to appoint the state superintendent (Oregon, South Carolina, Indiana, New Mexico).[15] Given that governors are often the ones held accountable for the performance of the state's public schools, it is not surprising that they are seeking to exert more influence over those responsible for curriculum and testing policy.

In addition, state courts have entered the curriculum arena via school finance litigation. Finance lawsuits have been part of state court dockets all across the country since Serrano v. Priest [16] was decided by the California Supreme Court in 1971. Cases decided in the 1970s and 1980s, which have been described as the first and second "waves" of school finance litigation,[17] centered primarily on principles of equal protection and rarely discussed the curriculum. However, the "third and fourth waves" of these cases, which began in the early 1990s and continue today,[18] have attacked school finance legislation on adequacy grounds and have had much to say about curriculum issues.

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[8] S.C. Code Ann. § 59-5-60(6)-(7) (2000).

[9] S.C. Admin. Code § R 43-231 (2001).

[10] S.C. Admin. Code § R 43-232 (2001).

[11] S.C. Admin. Code § R 43-234 (2001).

[12] S.C. Admin. Code § R 43-259 (2001).

[13] Utah Code Ann. § 53A-1-402(1)(c) (2001).

[14] Utah Admin. Code § R277-700 (2001).

[15] Mark Stricherz, Governors Seeking Levers to Improve Education, **Education Week**, Mar. 28, 2001, at 1, 16-17.

[16] 487 P.2d 1241 (Cal. 1971).

[17] *See* Keven Randall McMillan, The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns, 58 **Ohio State L.J.** 1867, 1867 (1998).

Curriculum has come into play in these more recent decisions because state courts have been asked to interpret state constitutional provisions requiring state legislatures to provide an "appropriate," "uniform," or "common" system of public education for all children. Several courts have concluded that such provisions require a certain qualitative level of education,[19] and ordered states to fund specific curricular components.

For example, the South Carolina Supreme Court, in Abbeville County School Dist. v. State,[20] recently held that the South Carolina Constitution's education clause, requiring the "maintenance and support of a system of free public schools," obligates the General Assembly to "provide the opportunity for each child to receive a minimally adequate education."[21] In turn, the Court explained its definition of "adequate:"

> We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire:
>
> 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
>
> 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
>
> 3) academic and vocational skills.[22]

At first glance, this broad brush order may not appear to dictate much more than the general scope of the curriculum. Yet now that this case has been remanded[23] to the trial court, many questions remain, such as: How much and what type of each category of curriculum described by the court must be provided in order for the educational program to be deemed "adequate?"

Sorting out the details can lead to some awkward legal arguments. For instance, one commentator noted that the State of New York's defense in its recent school finance lawsuit was that "[t]he Regents can require students to pass college-preparatory exams, but the Constitution requires the

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[18] *Id.*

[19] *Id.* at 1875-76.

[20] 515 S.E.2d 535 (S.C. 1999).

[21] *Id.* at 540.

[22] *Id.*

[23] Bill Robinson, Public School Funding Suit Back on Track, **The State**, Apr. 12, 2001, at B1.

Legislature only to provide money to support an eighth-grade literacy level."[24] In the New York case, the judge ultimately rejected this argument but refused to provide definitive guidance; he ruled that the state "must provide financing to bring students to an academic level far above that represented by the old competency tests (leading to a diploma with ninth-grade skills, at best), but refused to embrace the new Regents standards as a constitutional mandate."[25] At the same time, "the judge's description of high levels of literacy, numeracy, and other skills the Constitution now requires would be difficult to distinguish from the Regents standards."[26]

Judges in other states have been even more prescriptive. After the North Carolina Supreme Court ruled in Leandro v. State [27] that the North Carolina Constitution required the General Assembly to provide all students with a "sound basic education" consisting of instruction in several content areas,[28] Superior Court Judge Howard Manning examined the state's curriculum in detail and issued a series of rulings that could have a major impact on instruction.

Judge Manning first ruled that the state's Standard Course of Study, promulgated by the North Carolina State Board of Education, is in effect, "the State's curriculum,"[29] and that it "encompasses and exceeds the content requirements of a 'sound basic education' as defined by Leandro."[30] Then in a subsequent ruling, issued in March 2001, Judge Manning threw a wrench in the curriculum of many districts by ordering the state to provide programs for at-risk students by shifting resources from other programs, such as advanced classes and foreign language instruction, that are not essential to Leandro's "sound basic" standard.[31] This latter decision is now on appeal.[32]

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[24] Richard Rothstein, News Analysis: The Unforeseen Costs of Raising Academic Standards, **New York Times** (visitied Jan. 11, 2001) http://www.nytimes.com/2001/01/11/nyregion/11STAT.html.

[25] *Id.*

[26] *Id.*

[27] 488 S.E.2d 249 (N.C. 1997).

[28] The court defined "sound basic education" as one which provides the student with the opportunity to acquire:

> (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;
>
> (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation;
>
> (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and
>
> (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro, 488 S.E.2d at 255.

[29] Hoke County Board of Education v. State, No. 95CVS1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000), at *16.

[30] *Id.* at *15.

III. The "Tested" Curriculum: School Accountability Legislation and President Bush's "Leave No Child Behind" Initiative

The other major force working to centralize curriculum policy is the nationwide school accountability movement. Well over half the states now require students to pass tests for promotion and graduation, and the number is on the rise.[33] In addition, a substantial majority of the states have passed legislation requiring public report cards to be issued on the schools,[34] based in large part on student test scores. This movement has the potential to dramatically affect curriculum in at least two significant ways.

First, as politicians and school administrators put the heat on teachers to improve student test scores, schools may decide to eliminate "fringe" elements of the curriculum so students can concentrate more of their time on reading, writing, arithmetic, and other content areas subject to annual testing. Indeed, parents and commentators have already started to complain that the heavy emphasis on test performance has driven science, art, music, history, and civics curricula out of classrooms.[35] In addition, educators are now trying to make hard decisions about whether there should be a "tracked" curriculum in order to provide appropriate remedial instruction for students struggling to pass required tests, or whether they should simply force all students to take a college-prep curriculum, regardless of high failure rates that may result.[36]

Second, President Bush's "Leave No Child Behind" accountability initiative may raise anew concerns that surfaced under the Clinton Administration that the federal government is on the road toward establishing a national curriculum. In 1997, President Clinton aggressively sought to develop voluntary national tests that would be administered in the fourth and eighth grades to determine student proficiency in reading and math.[37] However, in the aftermath of vigorous opposition from conservatives, who called the proposal the "nationalization and federalization of education,"[38] Congress put a stop to the idea, barring the U.S. Department of Education from using any appropriations to develop national tests.[39]

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[31] Todd Silberman, State to Appeal At-Risk Student Ruling, **News & Observer** (visited Apr. 24, 2001) http://www.newsobserver.com/Tuesday/front/Story/426321p-420510c.html.

[32] *Id.*

[33] Tamara Henry, Taking Measure of U.S. Education, **USA Today**, Sept. 27, 1999, at 1D.

[34] Id.

[35] See, e.g., Greg Toppo, Advocates Worry that Basic, Testing Will Crowd Out Arts, **San Francisco Chronicle** (visited Mar. 19, 2001) http://www.sfgate.com/cgi-bin/article/cgi?file=/news/archive/2001/03/15/national1755EST0712.DTL.; Martin Dyckman, Learning is What's Sacrificed for Testing, **St. Petersburg Times** (visited Mar. 6, 2001) http://www.sptimes.com/News...f/Perspective/Learning is what s sa.shtml; Jessica Garrison, School Testing has Unintended Effects, **Los Angeles Times** (visited Jan. 16, 2001) http://www.latimes.com/news/learning/20010114/t00000; Richard Rothstein, Emphasis on Scores Comes at a Price, **New York Times** (visited Nov. 29, 1999) http://www.nytimes.com/library/national/112499lessons-edu.html.

[36] Lynn Olson, A Quiet Crisis: Unprepared for High Stakes, **Education Week**, Apr. 18, 2001, at 1, 12, 14, 16-17.

New controversy over national tests and curriculum may erupt depending on which version of federal accountability legislation Congress adopts. The House bill would allow states such as South Carolina and Texas that have already adopted testing programs for grades 3-8 to continue to use their own programs as evidence that children are progressing academically.[40] The Senate bill, on the other hand, would require all states to administer the National Assessment of Educational Progress (NAEP) test to all students grades 3-8.[41]

This part of the Senate bill may prove problematic for Congress and President Bush because conservatives have already lobbied to end the current practice of collecting NAEP data from the states that voluntarily administer the test, citing fears that reliance on NAEP will result in national curriculum.[42] As Chester Finn, Jr., recently observed, if the nature of the NAEP changes such that the federal government starts to reward or punish schools for NAEP performance, states will start to "organize what they're doing around NAEP, instead of NAEP being an independent audit."[43]

IV. The "Taught" Curriculum: Controversial Materials and Teacher Academic Freedom

At the same time states and the federal government are taking control of the "official" and "tested" curriculum, teachers and parents have begun to pull in the other direction, seeking to gain their own measure of control over the curriculum in their classrooms and homes. Even though courtroom battles over the "taught" and the "learned" curriculum tend to favor local school boards, the reality is that such disputes can be some of the most emotional in public education and distract local boards from concentrating on student achievement.

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[37] Rachel F. Moran, Sorting and Reforming: High-Stakes Testing in the Public Schools, 34 **Akron L. Rev.** 107, 112 (2000).

[38] Lynn Olson, Focus on Basics Key to Clinton Call for Testing, **Education Week**, Feb. 19, 1997, at 1, 19.

[39] Moran, *supra* note 55, at 112.

[40] Michelle R. Davis, Educators Watch U.S. Testing Debate, **The State**, Sept. 10, 2001, at A1.

[41] *Id.*

[42] David Hoff, Conservative Group Seeks to End State NAEP Program, **Education Week**, Mar. 29, 2000, at 29; Lynn Olson, Bust Test Plan Fuels Debate Over Uniformity, **Education Week**, May 9, 2001, at 23.

[43] David J. Hoff, NAEP Weighed as Measure of Accountability, **Education Week**, Mar. 8, 2000, at 1.

Regarding the "taught" curriculum, parents, administrators, and politicians vigorously insist on one hand that teachers teach the "official" curriculum to ensure high test scores and high "accountability" grades. Concerns over conformity have become so serious that in some school districts, teachers are required to follow daily lesson plans dictated from the central office.[44] On the other hand, creative teachers attempting to brighten dull subjects and stretch young minds complain about "teaching to the test" and being forced to get prior approval to use certain movies, videos, and other curricular materials. When these agendas collide, litigation is often the result.

School boards usually win these classroom battles over curriculum control for three reasons. First, most courts addressing the issue over the past ten years have concluded that K-12 teachers do not possess a First Amendment right to academic freedom.[45]

Second, courts have begun to apply the holding of Hazelwood School District v. Kuhlmeier[46] to teacher speech,[47] finding in a number of cases that school boards had the prerogative to shut down the presentation of certain curricula for legitimate pedagogical reasons. Some of the "legitimate pedagogical reasons" empowering school boards to censor curriculum include, but are not limited to: 1) shielding students from sexual content and violence in plays and movies that is excessive or inappropriate for the age group;[48] enforcing district policy on profanity,[49] and avoiding Establishment Clause violations.[50] Even though the application of Hazelwood has produced some harsh outcomes, particularly in the Boring decision,[51] it will likely continue to bear on classroom curriculum disputes, especially given pressure associated with high stakes tests and the reluctance on the part of many school boards to give unfettered discretion to teachers.[52]

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[44] Robert C. Johnston, In Chicago, Every Day Brings a New Lesson Plan, **Education Week**, Oct. 13, 1999, at 1; Abby Gooknough, Teaching by the Book, No Asides Allowed, **New York Times** (visited May 23, 2001) http://www.nytimes.com/2001/05/23/nyregion/23TEAC.html.

[45] *See, e.g.*, Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998) (holding that high school drama teacher "had no First Amendment right to insist on the makeup of the curriculum"); Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991) (finding that a secondary school teacher had no constitutional right to academic freedom); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3rd Cir. 1990) (holding that high school teacher had no right of academic freedom with respect to his choice of classroom management techniques). *Contra* Webb v. Lake Mills Community Sch. Dist., 344 F.Supp. 791, 799 (N.D. Ia. 1972) (holding that public school teachers have "some measure of academic freedom in the classroom"); Parducci v. Rutland, 316 F.Supp. 352, 356 (M.D. Ala. 1970) (holding that the decision by school officials to prohibit teacher from using a short story constituted an unwarranted invasion of her First Amendment right to academic freedom).

[46] 484 U.S. 260 (1988).

[47] *See, generally*, Donald F. Uerling, Academic Freedom in K-12 Education, 79 **Neb. L. Rev.** 956, 970 (2000).

[48] *See, e.g.*, Boring, 136 F.3d at 370 (holding that a teacher's selection of a play depicting lesbian women and women with illegitimate pregnancies was part of the curriculum and that school administrators could prohibit it because they "had a legitimate pedagogical interest in the makeup of the curriculum of the school"); Board of Educ. of Jefferson County Sch. Dist. R-1 v. Wilder, 960 P.2d 695, 701-702 (Colo. 1998) (upholding district controversial materials policy and termination of teacher who showed R-rated movie in violation of the policy, reasoning: "By allowing administrators greater control over the curriculum, the policy prevents students from being exposed to graphic sex, violence, vulgarity, or similar material. Controlling the entry of such subject matter into the classroom is plainly a legitimate pedagogical concern."); Borger v. Bisciglia, 888 F.Supp. 97, 100 (E.D. Wis. 1995) (upholding district's decision to ban showing of "Schindler's List" and its policy prohibiting R-rated movies, because the school "has a legitimate policy to try to keep harsh language, violence, and nudity out of the history or government

Third, courts have held that as long as school boards inform teachers about what curriculum materials and other types of expression are prohibited in the classroom, teachers cannot complain of due process violations if they are punished for ignoring the policy.[53] The key is advance notice; as one court has noted:

> [W]hile we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?[54]

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classroom curriculum."); Krizek v. Cicero-Stickney Township High Sch. Dist. No. 201, 713 F.Supp. 1131 (N.D. Ill. 1989) (holding that school district had legitimate educational reasons to establish content of curriculum and to sanction teacher for showing R-rated movie in class).

[49] Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998) (holding that school board had a legitimate academic interest in prohibiting profanity by students in their creative writing).

[50] *See, e.g.*, Marchi v. Board of Cooperative Educational Services of Albany, 173 F.3d 469, 475 (2nd Cir. 1999) (holding that schools "may direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings.'"); Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 331 (upholding dismissal of substitute teacher because of his refusal to refrain from reading the Bible aloud to students and discussing religion during class); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522 (9th Cir. 1994) (holding that science teacher did not have the right to discuss his views opposing evolutionism with students, because "[t]o permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment."); Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990) (holding that school board could prohibit social studies teacher from discussing nonevolutionary theories of creation with students, on grounds that the "first amendment is 'not a teacher license for uncontrolled expression at variance with established curricular content.'"); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990) (holding that school district properly prohibited elementary school teacher from reading Bible in class and from having religious books on shelf, because the district "had a secular purpose for its actions, namely, to assure that none of Mr. Roberts' classroom materials or conduct violated the Establishment Clause.").

[51] *See* Benjamin Dowling-Sendor, A Matter of Fairness, **American Sch. Bd. J.**, June 1998, at 14; Perry A. Zirkel, Boring or Bunkum?, **Phi Delta Kappan**, June 1998, at 791.

[52] Kathleen Kennedy Manzo, Officials Wary of Placing Faith in Teachers' Judgment, **Education Week**, Feb. 24, 1999, at 1.

[53] *See, e.g.*, Lacks, 147 F.3d at 723-24 (holding that teacher had sufficient notice that under the board's rules, she was not to permit profanity in her classroom, even if was part of a creative writing assignment); Wilder, 960 P.2d at 706 (holding that teacher had adequate notice of controversial materials policy where the policy had been published by the district and filed in the library of each school).

[54] Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993).

V. The "Learned" Curriculum: Parental Rights, Exposure to Curriculum, Discrimination, and Censorship

The "learned" curriculum can be a bit more worrisome for school officials. While local school boards retain a fair amount of latitude in determining what students can be required to read and understand, their discretion is not unlimited. Claims involving parental rights, the First Amendment, and equal opportunity can lead school boards into some treacherous, and uncertain, waters, where even if the board prevails, the sailing can be very rough.

One set of cases in this area deals with so-called "parental rights" issues, that is, challenges to the curriculum based on the parents' Fourteenth Amendment liberty interest in directing the upbringing and education of their children, an interest that is now well established in American law. As the Second Circuit Court of Appeals recently observed:

> "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as `of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Parents therefore have a constitutionally protected liberty interest in the care, custody and management of their children.[55]

In Parents for Better Schools, Inc. v. School District of Philadelphia Bd. of Educ.[56] the court held that a voluntary condom distribution program for high school students did not unconstitutionally burden parental rights because parents were provided the opportunity to opt out of the program and deny permission for their children to participate. Similarly, in Curtis v. School Committee of Falmouth[57] the Massachusetts Supreme Court held that a school program allowing students to obtain condoms upon request from a school nurse, or through school vending machines, did not violate parental rights because it was not coercive. The court reasoned in part: "[T]he plaintiff parents are free to instruct their children not to participate. The program does not supplant the parents' role as advisor in the moral and religious development of their children."[58] More importantly, stating a principle that has been emphasized by many courts in parental rights curriculum cases, the court noted:

> Although exposure to condom vending machines and to the program itself may offend the moral and religious sensibilities of the plaintiffs, mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program.[59]

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[55] Tenenbaum v. Williams, 193 F.3d 581, 593 (2nd Cir. 1999) (citations omitted).

[56] 978 F.Supp. 197 (E.D. Pa. 1997).

[57] 652 N.E.2d 580 (Mass. 1995).

[58] *Id.* at 588.

[59] *Id.*

Perhaps the most widely publicized parental rights case in recent years is Brown v. Hot, Sexy and Safer Productions, Inc.[60] There, parents sued after their children attended a mandatory school-wide AIDS education assembly at Chelmsford (MA) High School in which the presenter gave several sexually explicit monologues and participated in sexually suggestive skits with several minors chosen from the audience. Dismissing the plaintiffs' parental rights claims, the court held:

> The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.[61]

The distinction between "mere exposure" and compulsion is important in these cases. Consistent with Brown, courts have been unwilling to find that curriculum either violates parental rights, or intrudes on the right to Free Exercise of religion, if it is simply offensive to parental beliefs, rather than coercive.[62] On the other hand, if the court finds elements of coercion, the curriculum is likely to be deemed unconstitutional. For example, the court in Alfonso v. Fernandez[63] struck down a condom distribution program adopted by the New York City Board of Education as part of its HIV/AIDS curriculum because it allowed students to obtain condoms without parental consent and did not provide parents opportunity to "opt-out" their children. Distinguishing the "mere exposure" cases from the curriculum at issue, the court stated:

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[60] 68 F.3d 525 (1st Cir. 1995).

[61] *Id.* at 533-34.

[62] *See, e.g.*, Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994) (holding that school district's use of Impressions Reading Series did not violate parents' Free Exercise rights because it did not preclude the parents from meeting their religious obligation to instruct their children); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987) (stating that "[i]t is abundantly clear that the exposure to materials in the Holt [reading] series did not compel the plaintiffs to 'declare a belief,' 'communicate by word and sign [their] acceptance' of the ideas presented, or make an 'affirmation of a belief and an attitude of mind.'").

[63] 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

> This is not a case in which parents are complaining solely about having their children exposed to ideas or a point of view with which they disagree or find offensive. We would agree that, standing alone, such opposition would falter in the face of the public school's role in preparing students for participation in a world replete with complex and controversial issues. However, the condom availability component of the respondents' distribution program creates an entirely different situation. Students are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases.[64]

Another set of cases deals with attempts by parents to censor books and other curricula to which they object on racial, moral, or other grounds. Where the legal challenge is based on curriculum *selection*, particularly where the curriculum at issue is well respected literature, courts usually defer to school officials. In *Monteiro v. Tempe Union High Sch. Dist.*,[65] for instance, the Ninth Circuit dismissed an African-American parent's challenge to the school district's use of *Huckleberry Finn*, reasoning in part:

> There is, of course, an extremely wide—if not unlimited—range of literary products that might be considered injurious or offensive, particularly when one considers that high school students frequently take Advanced Placement courses that are equivalent to college-level courses. White plaintiffs could seek to remove books by Toni Morrison, Maya Angelou, and other prominent Black authors on the ground that they portray Caucasians in a derogatory fashion; Jews might try to impose civil liability for the teachings of Shakespeare and of more modern English poets where writings exhibit a similar anti-Semitic strain. Female students could attempt to make a case for damages for the assignment of some of the works of Tennessee Williams, Hemingway, or Freud, and male students for the writings of Andrea Dworkin or Margaret Atwood. The number of potential lawsuits that could arise from the highly varied educational curricula throughout the nation might well be unlimited and unpredictable. Many school districts would undoubtedly prefer to "steer far" from any controversial book and instead substitute "safe" ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit—even one having but a slight chance of success. In short, permitting lawsuits against school districts on the basis of the content of literary works to proceed past the complaint stage could have a significant chilling effect on a school district's willingness to assign books with themes, characters, snippets of dialogue, or words that might offend the sensibilities of any number of persons or groups.
>
> Further, any school board attempting to remove books from its curriculum on the ground that the works might offend would likely be vulnerable to First Amendment actions brought by students desiring to study those books, and possibly teachers, as well. Schools could be caught between those seeking to remove *Huckleberry Finn* and those seeking to study it. It would clearly not be in the best interests of our public education system and its students to have such competing lawsuits become a part of our legal landscape.[66]

Indeed, courts simply have not been very receptive to claims that curriculum selections constitute race or sex discrimination. A federal district court in Minnesota recently rejected an African American college student's claim that the college's "Euro-centric" curriculum subjected him to a hostile racial environment,[67] and other courts have reached similar conclusions.[68]

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[64] *Id.* at 266 (citations omitted).

[65] 158 F.3d 1022 (9th Cir. 1998).

[66] *Id.* at 1030-31.

Yet schools may be vulnerable if their curriculum decisions do in fact deny equal educational opportunity to racial minorities. In a groundbreaking California case, several Latino and black students have sued the Inglewood Unified School District, the state of California, and the state board of education alleging that they are being denied "equal and adequate access to AP courses."[69]

Moreover, where the legal challenge is based on the removal of curriculum or books, schools walk on thinner ice, given students' Constitutional right to receive information and ideas[70] and the Supreme Court's plurality decision in Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico,[71] holding that school officials may not exercise their discretion to remove books from school library shelves "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[72] Thus, whether school boards are considering controversial texts in school libraries[73] or in classrooms,[74] they must be wary about banning books solely because of a desire to deny students access to ideas with which some parents, or the board, disagree.

VI. Observations and Suggestions

Commenting on the consolidation of curriculum power at the state and federal levels, Kirst wrote in the early 1980s:

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[67] Shorter v. St. Cloud University, Civ. No. 001314HK/RLE, 2001 WL 912367 (D. Minn., Aug. 14, 2001).

[68] *See, e.g.*, Grimes v. Sobol, 832 F.Supp. 704 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2nd Cir. 1994) (holding that a Title IX claim stemming from the school's choice of curriculum materials was not actionable).

[69] David Hill, Test Case, **Education Week**, Mar. 1, 2000, at 34.

[70] Catherine J. Ross, An Emerging Right for Mature Minors to Receive Information, 2 **U. Pa. J. Const. L.** 223, 227 (1999).

[71] 457 U.S. 853 (1982).

[72] Id. at 872 (citation omitted).

[73] *See* Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184 (5th Cir. 1995) (remanding the decision of a school board to remove a book about voodoo from the school library); Case v. Unified Sch. Dist. No. 233, 908 F.Supp. 864 (D. Kan. 1995) (holding that school district violated free expression right of students by denying access to book based on their personal disapproval of its ideas); Marnie Roberts, School Sued Over Banned Books, **Education Week**, Mar. 10, 1999, at 4 (noting lawsuit filed against Wisconsin school district arising out of its decision to remove four books with homosexual content from high school library).

[74] Joel Campbell, Schools Agonize Over Book Choices, **Deseret News**, Oct. 31, 1999 (noting process by which Utah school districts determine which controversial books are allowed in curriculum); E.J. Dionne Jr., Harry and the Book Banners, **Washington Post**, Nov. 2, 1999, at A21 (describing parental objections in South Carolina, Nebraska, and California to the reading of Harry Potter novels in classrooms); Jodi Wilgoren, Is Lure of Harry Potter Satanic?, **Deseret News**, Nov. 1, 1999, at A1 (same).

> There is no counterforce to this growth of central control. The states are playing a leadership role in 1983 because of a striking lack of countervailing initiative and power at the local or professional level. Local school boards, administrators, teachers, PTAs, and taxpayers are either forced or content to play a reactive role. School boards and administrators have the means, through their statewide organizations, to devise their own plans for raising academic standards and for presenting such plans to the state policymakers. I find it surprising that so few have done this.[75]

Echoing Kirst, the authors of this paper continue to be surprised. Notwithstanding the fact that the power of local school boards erodes more every year as authority over curriculum shifts to state officials, Congress, and the courts, local boards are doing little to stem the tide.

We propose that despite current trends, local control of schools remains an important principle of American democracy, and that local school boards can, and perhaps should, take certain steps to reassert their prerogative over the curriculum. Such steps might include some, or all, of the following:

1) School boards can insist on rigorous curricula and standards that surpass those mandated by the state. Many state accountability laws require students to demonstrate only minimum competency in order to pass from grade to grade or graduate.[76] Thus, the law does not preclude school boards from requiring a demanding curriculum and student proficiency levels that go beyond these minimums.

2) Rather than providing a "one size fits all" curriculum that emphasizes nothing but the basics in every school, school boards should consider providing a broad curriculum and opportunities for students to explore their unique talents and interests. One method of doing this is to set up magnet schools for the arts, science, and technology, as well as "examination" schools that require students to qualify for admittance based on test scores. Whether or not magnet schools are feasible, enriching the curriculum may be crucial to continued public support of the schools. The most recent Phi Delta Kappa poll indicated that 64% of public school parents want high schools to offer a wide variety of classes as opposed to a few basic courses.[77]

3) School boards should have clearly articulated controversial materials policies and ensure that all teachers and administrators are well trained on what materials may and may not be included in the curriculum. Such policies provide freedom for both the board and employees by providing clear guidelines for teachers and preventing the board from being surprised with angry patron complaints.

4) School boards should seek stakeholder input on sensitive curriculum topics, such as those dealing with human sexuality, school safety, and religion. For example, the Modesto City Schools successfully resolved a protracted conflict over safe schools curriculum and gay students in 1998 when

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[75] Michael W. Kirst, **Who Controls Our Schools** 129 (1984).

[76] *See, e.g.*, Utah Code Ann. § 53A-1-603 (requiring the State Board of Education to develop and administer a tenth grade "basic skills competency test"); Peter Schrag, Too Good to be True, **American Prospect** (visited Dec. 12, 1999) http://www.americanprospect.com/archives/V11-4/schrag.html (noting that the Texas high school exit exam is pegged to a seventh or eighth grade level).

[77] Lowell C. Rose & Alec M. Gallup, The 33rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, **Phi Delta Kappan**, Sept. 2001, at 41, 55-56.

the school board organized, and accepted recommendations from, a 120-member community task force that included parents, educators, law enforcement officers, and clergy.[78] In addition, several courts have upheld school policies developed through some type of public engagement process.[79]

5) School boards should regularly seek legal counsel from competent school attorneys so they can accomplish their curriculum objectives without running afoul of laws that frequently affect the curriculum, such as state statutes on sex education, federal statutes such as the Equal Access Act, and the First Amendment. Boards that either do not seek counsel, ignore it, or get bad advice, generally do so at their peril.[80]

There may be many other steps boards could take. The important point is that if local school boards are going to be serious about improving education in their communities, they must know the law of curriculum and make defensible curriculum policy a top priority.

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[78] David S. Doty, Forging a Common School: The Use of Public Engagement, Negotiated Policy Processes, and Mediation to Build Consensus on Religious Issues in Public Education (1999) (unpublished Ph.D. dissertation, Brigham Young University (on file with author and Brigham Young University library); David S. Doty, Public Enragement or Public Engagement, **Education Week**, Mar. 1, 2000, at 72.

[79] *See, e.g.*, Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.3d 1311 (8th Cir. 1980) (upholding policy on teaching about religious holidays that was developed by citizen task force); Clever v. Cherry Hill Township Bd. of Educ., 838 F.Supp. 929 (D.N.J. 1993) (upholding policy on religious holidays formulated by broad-based policy committee); New York State Sch. Bd. Ass'n v. Sobol, 591 N.E.2d 1146 (N.Y. 1992), *cert. denied*, 506 U.S. 909 (1992) (upholding state school board rules requiring local school boards to develop AIDS education curriculum with "community advisory councils" comprised of parents, employees, and representatives from religious organizations).

[80] *See, e.g.*, Coleman v. Caddo Parish Sch. Bd., 635 So.2d 1238 (La. Ct. App. 1994) (holding that several portions of the sex education curriculum adopted by the board violated Louisiana state statutes on sex education curricula); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999) (striking down policy of school board requiring a disclaimer to be read immediately before the teaching of evolution in all elementary and secondary school classes); Gibson v. Lee County Sch. Bd., 1 F.Supp.2d 1426 (M.D. Fla. 1998) (strking down certain portions of Bible History curriculum adopted by the board after it ignored the counsel of at least three different attorneys counseling the board); East High Sch. Prism Club v. Seidel, 95 F.Supp.2d 1239 (D. Utah 2000) (ruling against assistant superintendent's unilateral decision to deny application of gay student club under district's closed forum policy on grounds it was not related to the curriculum); Cordova v. Vaughn Municipal Sch. Dist. Bd. of Educ., 3 F.Supp. 1216 (D.N.M. 1998) (ruling that school board attorney was state actor and subject to § 1983 civil rights liability for his role in terminating a teacher who used tolerance curriculum developed by Southern Poverty Law Center).

TESTING MODIFICATIONS FOR DISABLED STUDENTS: THE SCHOOLS, COURTS AND PRESS EXAMINE A COMPLEX ISSUE

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Testing Modifications for Disabled Students: The Schools, Courts and Press Examine a Complex Issue

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" Test modifications are changes in testing procedures or formats which provide students with disabilities an equal opportunity to participate in test situations and to demonstrate their knowledge and abilities. Test modifications can change the way in which test items are presented to the student, the student's method of responding to test items, to the process a student uses to derive responses to test items. Test modifications should not be excessive; they should alter the standard administration of a test to the least extent possible." Test Access and Modification for Individuals with Disabilities: November, 1995. State Education Department, Office for Special Education Services.

Narrative Outline

1. The original intent of Public Law 94-142
   - Provide each child in the United States with a free, appropriate, public education (FAPE).
   - Creation of an Individualized Education Plan (IEP) for each student.
   - Provision of resources for disabled students.
   - Provide accommodations for disabled students.
   - Creation of an interdisciplinary team to review the needs of disabled students.
   - Due process for appeals of the decision of the interdisciplinary team.
   - Identification of teachers certified in special education to instruct disabled students.
   - Stipulations to group disabled students with non-disabled students to the greatest extent possible.
   - Testing modifications to the extent necessary to allow each child to receive FAPE.

2. Individuals with Disabilities Education Act Amendment of 1997 (IDEA).
   - Test modifications had to be noted on the IEP.
   - Student status in terms of statewide and district tests had to be noted on the IEP; exemptions justified on the IEP (Reetz, Ring & Jacobs, 1999).
   - Modifications and adaptations to allow the student to demonstrate knowledge at same level as peers.
   - States required to include special education students in standardized test with appropriate accommodations or lose funds.
   - States to indicate what accommodations were received by students with disabilities (i.e.: flagging).

3. Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

   Students with a diagnosis of Attention Deficit Hyperactive Disorder or Learning Disabilities covered.

   Standard needed to be considered disabled under ADHD does not include inability to receive an educational benefit without the addition of accommodations and/or modifications.

4. Revision of ethical standards (1985) Standards for Educational and Psychological Testing.

   American Psychological Association.

   American Educational Research Association.

   National Council on Measurement in Education.

5. President Bush endorses annual testing of all students in grades three to eight

   Issue of accountability as a prerequisite to federal funding.

   States require testing of students as apart of a promotion policy.

   Students required to go to summer school if unable to achieve certain scores on state mandated tests.

6. 34 CFR Part 300 Office of Special Education and Rehabilitation Services (1992).

   Deals with all of the federal regulations created under 20 USCS 1400 et al..

   In terms of supplementary aids and services, the law requires "aids, services, and other supports that are provided in regular education classes or other education related settings to enable children with disabilities to be educated with non disabled children to the maximum extent appropriate (under the law).

   Ended identification (flagging) of special education courses on a transcript.

7. Hishinuma (1998).

   In determining the need for modifications, need to determine whether the construct to be tested is effected by the impairment that caused the disability.

8. Zurcher (2000).

   Empirical study to investigate the comparability of scores after accommodations were granted to learning Disabled.

9. Review of recent litigation.

   T.R. v Kingswood Tp. Board of Education, 205 F.3d 572 (2000).

Highlights the two part test for assessing compliance with IDEA's "meaningful benefit test." Accommodations are satisfactory if they enable the student to receive an education in a regular class using supplementary aids and services.

Muller on Behalf of Muller v. Committee on Special Education of East Islip Union Free School District 145 F.3d 95 (1998).

Issues is whether or not depression qualifies as an emotional disability under IDEA where the federal standard is "inability to learn" alone, whereas in NY inability to learn is combined with other criteria before a determination can be made concerning whether or not depression is an educational disability.

Fritschle v. Andes, 45 F.Supp. 3d 500 (1999).

Examines the types of modification that can be offered to meet the short-term measurable goals described in the student's IEP.

Ross v. Framingham School Committee, 44 F.Supp. 3d 104 (1999).

Qualified student gets special education related services and support services. Case provides extensive listing of various modifications.

10. The Data for New York State 1999-2000.

395,139 students in New York State are identified as students with disabilities.

Statewide, 78% of students with disabilities receive test accommodations/modifications.

In New York City, 79.6% of students with disabilities receive test accommodations/modifications.

The most frequently provided modifications for these students is extended time.

72.6% of students with disabilities receive time extensions and/or rest periods.

28.2% of students with disabilities have tests and/or questions read to them.

17.1% of students with disabilities are allowed to use a calculator.

9.7% of students with disabilities can use a spell check device and/or have spelling waived.

11. The Oregon Ruling (2001).

Ruling will broaden the current list of allowable accommodations.

More help offered to learning disabled students on statewide tests – spell-check software.

Ruling may provide a blueprint for 15 other states now considering expanding accommodations.

State tests not to be the sole determinant of whether students can enroll in honors classes.

12. The Backlash.

Parents across the U.S. concerned about high stakes exams (Golden, 2001).

Critics say accommodations artificially inflate scores.

Parents are seeking a diagnosis such as ADHD to access accommodations for their children.

More so in affluent areas – requests for 504 determination of disabilities rising.

School districts not likely to go to a hearing over test modifications.

13. Predictions concerning the future of test modifications.

Educational and legal implications.

Politicians become increasingly involved in the question of testing (standards) as test scores are linked to funding of educational programs.

Listing of district wide test scores has large influence on housing prices in community, the higher the test scores, the higher the prices for real property in a community.

Increased pressure on teachers/administrators/ students to perform.

Teaching to the test – incentives for teachers and schools who raise test scores.

Parents access of information concerning test modifications through Special Education PTA and the Internet.

Growing misuse of special education and ADA protections as a way of manipulating test scores, especially in affluent suburbs.

14. On the Horns of a Dilemma.

One of the main intentions of the law for education students with disabilities was to include parents in educational decisions concerning their children.

The number of parents bringing attorneys or advocates to Committee on Special Education meetings is increasing.

More modifications are being proposed and are likely to be adopted.

Children with multiple disabilities are directed to return to the public schools by the State Education Department.

The incidence of children born with disabilities such as autism is rising; for example, in 1960, two in 10,000 children were born with autism. Today the incidence is one in 500 to two in 2000 (Nichols, 2001).

More specialists to work with disabled students are hired each year (speech, occupational therapists, physical therapists, oro-motor therapists, psychologists, social workers etc.).

Does the presence of trained personnel accelerate the rate of identification of children with disabilities?

A class action suit in Cambridge, Massachusetts by the parents of three autistic children claims that a preservative, Thimerosal, widely used in childhood vaccines for Hepatitis B, diphtheria/tetanus, contains toxic amounts of ethyl mercury which can cause neurological problems (Nichols, 2001).

Will parents of non-disabled children begin to lobby for test modifications?

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TEACHER TENURE: THE RIGHTS OF TEACHERS

The Legislative Dismantlement of Teacher Tenure: A Case Study

George Ross
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Procedural Due Process and Mandatory Statutory Compliance Issues in Teacher Termination Hearings

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EDUCATION LAW ASSOCIATION
47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
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THE LEGISLATIVE DISMANTLEMENT OF TEACHER TENURE: A CASE STUDY

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The Legislative Dismantlement of Tenure: A Case Study

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Background

Tenure in an academic arena can be broadly defined as an expectation of continued employment (with a school district or university) following a probationary period of satisfactory performance. After earning tenure, the employee may be removed from her/his position only after a showing of cause. State statutes for public school teachers vary considerably but often address the number of years in probationary teaching service necessary to earn tenure.

Tenure laws for American public school teachers have their origins in fundamental laws of due process. Both the Fifth and Fourteenth Amendments to the United States Constitution ensure that no person shall be deprived of "life, liberty, or property, without due process of law." The due process clause was repeated in the post-Civil War Fourteenth Amendment to make certain that the right extended to state governments.[1] Due process has the primary purpose of extending fairness to the individual in relationship to government.[2]

It was not until late in the nineteenth century that the first due process protections for public school teachers were codified in a state law (Massachusetts in 1886). In Georgia, state-wide tenure legislation was not available for all public school teachers until 1975. Georgia's "Fair Dismissal Law", while absent the word "tenure," nevertheless provided public school teachers in the state with all the rights normally associated with tenure. As recently as 1999, Georgia Law stated that: "A teacher who accepts a school year contract for the fourth consecutive school year from the same local board of education may be demoted or the teacher's contract may not be renewed only for those reasons set forth in subsection (a) of Code Section 20-2-940."[3]

In 2000, Georgia's newly elected Governor, Roy Barnes, sought sweeping changes designed to remedy real and perceived problems with the state's educational system. The Governor believed that the source of at least some of the state's education problems could be traced to its teacher tenure law that supposedly provided job protection for poor classroom teacher performance.

Ultimately, the Governor's "A+ Education Reform Act" became state law. Tenure for new teachers in Georgia has now been abolished. Georgia law now states that "a person who first becomes a teacher on or after July 1, 2000, shall not acquire any rights under this Code section to continued employment with respect to any position as a teacher."[4] Georgia teachers who had already earned tenure rights prior to that date continue to retain such rights.

Property Interests and Teaching

Early in our nation's history, those who held government positions were expected to consider their employment with the government a privilege. The employment of a teacher could be terminated at any time by the employing school district often based on no more than a mere showing that the teacher had breached some rule or policy that the district felt was reasonable. Constitutional rights claims by the teacher seldom arose and were summarily dismissed if they did.

The watershed case in the application of constitutional standards to teacher employment was decided in 1968, *Pickering v. Board of Education*[5]. The United States Supreme Court ruled in this free speech case that a public school teacher has the right to freedom of speech when he/she comments on matters of public concern absent a "compelling state interest" to prevent the speech.

Fourteenth Amendment property interest rights for teachers were not clarified by the Supreme Court until four years later in the companion cases of *Board of Regents of State Colleges v. Roth*[6] and *Perry v. Sinderman*[7]. Here, two instructors of public universities (one in Wisconsin, the other in Texas) challenged the decision by their institutions to non-renew their contracts for a subsequent academic year. Both instructors claimed a Fourteenth Amendment property interest in their positions and sought to discover the reasons for their non-renewal and recognition by their institutions of substantive and procedural due process rights. Roth had been recently hired as an assistant professor serving for a fixed term of one year in his first teaching job. Sinderman was a veteran teacher in the Texas junior college system having served for several years under successive one-year contracts.

Justice Stewart writing for the majority in both cases found that Roth had no legal expectation of employment beyond the specified terms of his contract. "A relatively new teacher without tenure…is under Wisconsin law entitled to nothing beyond his one-year appointment."[8] He went further, however, to comment about the concept of property interest. "To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[9] Justice Stewart also clarified the circumstances under which one acquires Constitutional property interests (in a public school teaching job) when he opined that "property interests...are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[10]

In the case of Sinderman, the Supreme Court found that a long period of service combined with statements in the faculty handbook and existing state guidelines created a situation where *de facto tenure* existed. There was, therefore, a legitimate right to procedural due process "to a statement of reasons and a hearing before college officials upon their decision not to retain him." [11]

Rather than have the courts define its teacher protection rights, the Georgia legislature moved swiftly after Roth and Sinderman to fashion its version of a teacher tenure law. As mentioned above, the word "tenure" was not a part of the law. But, in fact, a Georgia teacher who had successfully taught for three consecutive years with the same public school district gained the right to a hearing in cases of non-renewal

If a teacher has a continuing and unlimited employment status extending for an indefinite period of time or holds statutory tenure, then a property interest in the employment is presumed.[12] Justice Stewart's comments that property interests (like job tenure) are not created by the Constitution but "stem from an independent source such as state law" combined with the fact that all states have statutes regarding tenure, makes a strong case for legislative control over teacher tenure.

The Realities of Georgia's New Law

Georgia is currently in its second year without a teacher tenure law. A number of individuals across the state who first became teachers after July 1, 2000 now serve at the pleasure of the superintendent and the local board of education. The furor that existed as the legislation was being considered has ceased. The National Education Association through its web site warned potential applicants for Georgia teaching jobs to be cognizant that the state does not provide tenure protections for new teachers.

Recently, one metropolitan Atlanta school district passed it's own version of a tenure law. Nothing in state law prohibits local school districts from such action. The president of the local district's NEA chapter was quoted as saying "this is something we've worked very hard for ever since fair dismissal for new teachers was eliminated statewide by the A+ Education Reform Act." The president of the Georgia Association of Educators called the school district's decision "a positive beginning for the remainder of the state." New teachers to the district who complete three straight years of satisfactory evaluations will gain "quality teacher status (QTS)." To obtain QTS means that teachers would receive the right to hear charges brought against them and an opportunity to rebut the charges in a due process hearing - probably before a tribunal or the local board of education.

One rather prominent attorney who represents over half of the school districts in the state predicts that the new law will have little impact on a district's ability to hire new teachers or the process needed to terminate them. He has recommended for several years that school districts provide some kind of due process hearing for non-tenured teachers even though there is no legal obligation to do so. His reasoning is based on the fact that many teachers facing non-renewal often claim that some Constitutional right has been abridged. It is often the best practice, therefore, to provide a hearing for the teacher at the local level lest a claim of due process violation arise in federal court.

Conclusion

According to a recent NEA publication Georgia is one of only three states that has no state tenure law.[13] Nineteen other states have substantial job protections for beginning teachers and sixteen states "enjoy few or no rights in connection with non-renewal decisions."[14]

Apparently, Georgia's Governor has attempted to apply a "business world mentality" to education. That mentality generally holds that employees who are not performing their responsibilities to the standards set by the company should have their employment severed without the burden of having to show cause or provide the employee with the opportunity to defend himself.

The government (school district) as employer has every right to expect its employees (teachers) to perform their responsibilities to the best of their abilities within the adopted policies and guidelines. But as government workers, public school teachers enjoy Fourteenth Amendment property and due process protections. These protections, however, are not automatically available even though the teacher may have "an abstract need or desire for [them]," or a "unilateral expectation of [them]." Rather, their claim of due process/property interests "are created ... by existing rules or understandings that stem from an independent source such as state law."

Georgia has recently seen fit to separate its new teachers from Fourteenth Amendment due process and property interests via the A+ Education Reform Act of 2000. For now the consequences of the act for new teachers appear minimal. The author knows of no current legal challenges to the law by any group or individual teacher.

Other state legislatures across the nation have the power to dismantle, modify, or completely dissolve their teacher tenure laws. Educators and other interested groups would do well to be cognizant of the political climate in their state when matters of teacher tenure are debated.

PROCEDURAL DUE PROCESS AND MANDATORY STATUTORY COMPLIANCE ISSUES IN TEACHER TERMINATION HEARINGS

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Narrative Outline
Procedural Due Process and Mandatory Statutory Compliance Issues in Teacher Termination Hearings

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Introduction

Today, most states have legislation granting most, or all, teachers tenure protection upon their having satisfactorily served a probationary period of employment. Courts have uniformly sustained the constitutionality of such legislation.[1]

Tenure statutes provide that a teacher's contract continues without any need for express renewal. Specified procedures must be followed to terminate the contract. Although these procedures vary widely in detail from state to state, they involve three elements: timely notice that dismissal is being contemplated, specification of charges against the teacher, and a hearing at which the charges are examined and a decision made regarding the teacher's retention.

The general rule is that only those positions enumerated in the tenure statute are encompassed by its provisions.[2] Therefore, locally created positions with titles not set out in the statute are not covered. Which positions are to be covered is within the prerogative of the legislature.

Normally, teachers are employed under yearly contracts. In such cases, the board must act to renew the contract at the close of the school year before the teacher can be reemployed. Teachers may also be employed under continuing contracts, which are automatically renewed if the school board does not inform them by a certain statutory date that their services will not be needed during the coming school year. Whether procedural due process requires strict or substantial statutory compliance of the notification requirement by the board is required for nonrenewal of a teacher on a continuing contract may be determined by the facts of the case.

This article discusses the Oklahoma Teacher Due Process Act (TDPA) of 1990[3] regarding procedural due process requirements of notification to a teacher before the teacher's contract may be nonrenewed by the board of education. The following cases deal with the issue of whether strict or substantial statutory compliance is required for nonrenewal notification of teachers on continuing contracts.

Statutory Notification of Nonrenewal Recommendation

Oklahoma statute requires the following of the board of education regarding notification to the teacher of a recommendation of nonrenewal:

> A board of education shall HAVE authority to enter into written contracts with teachers for the ensuing fiscal year prior to the beginning of such year, if, prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified the teacher in writing by registered or certified mail that a recommendation has been made not to reemploy the teacher for the ensuing fiscal year, and if, by April 25, such teacher has not notified the board of education in writing by registered or certified mail that such teacher does not desire to be reemployed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for other

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[1] Teachers' Tenure Act Cases, 329 Pa. 213, 197 A.344 (1938); State ex rel. Bishop v. Board of Education, 139 Ohio St. 427, 40 N.E.2d 913 (1942).

[2] Thrash v. Board of Educ., of School Dist. 189, 435 N.E. 2d 866 (1982).

[3] 70 O.S. 6-101.20 *et seq.*

> teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district.[4]

The intent of the TDPA is to provide a process that protects the constitutional rights of teachers.[5] The boundaries of due process were outlined by the United States Supreme Court in the case of Cleveland Board of Education v. Loudermill.[6] Loudermill requires that an employee is entitled to "notice" and an "opportunity to respond" prior to termination. The court summarized these requirements as follows:

> The opportunity to present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, and an explanation of the employers' evidence, and an opportunity to present his side of the story.[7]

By recognizing the limits on a teacher's due process rights, the Supreme Court struck a balance between the employee's interest in retaining employment and presenting his side of the story and the public employers interest in quickly removing and unsatisfactory employee.[8] Whether substantial or strict compliance is required under the TDPA will turn on the facts upon which the recommendation is based and a balancing of the interests of the teacher and the school district.

Substantial Compliance

The 10th Circuit Court of Appeals, in Antencio v. Board of Education of Penasco Independent School District No. 4,[9] used the principles of Loudermill and Roth in considering the issue of substantial compliance with state law in a teacher discharge. The Court held that the mere fact that a discharge may not be in accordance with state law does not necessarily mean that there has been a violation of due process.[10]

In Antencio, Mr. Atencio, a former teacher and coach, had a two-year contract to serve as superintendent. Mr. Atencio failed in several duties, showing inadequacy in supervision and financial mismanagement. The school board sent a notice of discharge and set a hearing date. The board met and voted to discharge Mr. Atencio. Mr. Atencio filed an appeal according to the New Mexico statutes. On appeal he argued that he had been denied the conference procedures as outlined in New Mexico law for discharge involving unsatisfactory work performance.

Even though Mr. Atencio established that the hearing procedures outlined by New Mexico Law were not followed, the court held that Mr. Atencio's due process rights were not violated because he had fair notice and an opportunity to respond. The court rejected the argument that the New Mexico procedures could define the plaintiff's due process rights.

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[4] 70 O.S. 6-101(E).
[5] Parker v. Independent School District No. 1-003 of Okmulgee County, 82 F.3d 952 (10th Cir. 1996).
[6] 470 U.S. 532 (1986).
[7] *Id.* (See also, Board of Regents v. Roth, 408 U.S. 564, 569-570, 92 S.Ct. 2701, 2705 (1972).
[8] *Id.* at 546.
[9] 658 F.2d 774, 779 (10th Cir. 1981).
[10] *Id.*

A similar decision was reached in Goodrich v. Newport News School Board.[11] In this case, the plaintiff claimed that her due process rights were violated because the school did not follow the proper procedure outlined by school policies. The court held that, even if the policies were not followed, the plaintiff's due process rights were not violated because plaintiff received notice and an opportunity to be heard.

Other courts have considered the issue of substantial compliance in due process protection. All of the courts concurred with the position that all that is required for due process in such cases is fair notice and hearing.[12] A seminal case relied on in these other circuit decisions show what constitutes an opportunity to be heard. In Bates v. Sponberg,[13] the court held that it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions. The court held that a mere departure from regulations, standing alone, does not deprive a person of any right that can be asserted in federal court.[14]

Demonstrable Prejudice

The Oklahoma Supreme Court addressed the issue of whether or not substantial compliance is sufficient in the application of statutory procedure by a state agency. In Banking Bd. of State of Oklahoma v. Wilkerson, a state agency had made certain technical mistakes in the application of the statutory procedure.[15] The court stated as follows;

> We reject the jurisdictional quality of these requirements . . . [The statute] basically provides legislative guidelines of the procedures to be followed by the Board in order to provide a fair hearing to all parties. In the absence of a showing of prejudice by an aggrieved party, the reversal of a Board decision merely because of a technical violation, does not seem reasonable or mandate . . . it is within the discretion of an administrative agency to relax or modify procedural rules, and . . . the modifications are not reviewable except upon a showing of substantial prejudice.
>
> . . . (A) lack of evidence, coupled with (the) general rule (that) findings, decisions and orders of an administrative body, in the absence of evidence to the contrary, are presumptively correct and valid, leads us to the conclusion that any slight failure to comply with the technical norms was not enough to justify . . . reversal of the Board's finding.[16]

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[12] (See Brandywine Affiliate, NCCEA/DSEA v. Board of Education, 555 F.Supp. 852 (D. Del. 1983); Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. Tex. 1985); Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986); McDarby v. Dinkins, 907 F.2d 1334 (2d Cir. N.Y. 1990).

[13] 907 F.2d 325, 329 (6th Cir. 1976).

[14] *Id.* at 331.

[15] 1982 OK 33, 642 P.2d 1141 (Okla. 1982).

[16] *Id.* (ellipsis added)

The Oklahoma Court of Civil Appeals followed this decision in Isch v. Okl. Independent Sch. Dist. No. 1-89.[17] Faced with a school board that did not follow rules regarding documents and witness lists, the Court stated that such failure to meet procedural guidelines does not in and of itself result in an invalid proceeding. Some demonstrable prejudice must be shown.[18]

Legislative Intent of Substantial Compliance with the Statutory Deadline

Under the TDPA, a plan of improvement requires the school district to establish a reasonable time for improvement, not to exceed two (2) months, taking into consideration the nature and gravity of the teacher's performance or conduct.[19] The Act requires the administrator to make a recommendation to the superintendent "[i]f the teacher does not correct the poor performance or conduct cited in the admonition *within the time specified . . .*" (Emphasis added.)

In House v. Independent School District I-29 of Muskogee County,[20] a principal placed the teacher on a plan of improvement in accordance with the TDPA. There was no question in the case that the principal failed to specify a reasonable time for improvement in the plan. The teacher offered nothing to indicate how she might have been prejudiced by the principal's omission. The court held that the explicit statutory requirement that plans for improvement included a specific time might be a mere technical requirement deemed harmless in the absence of prejudice to the teacher. The court noted a teacher who has been given more time than the statutory maximum would actually benefit from the noncompliance.[21]

In House, the school maintained that legislative intent is primarily (a) to ensure that teachers have a reasonable opportunity to correct poor performance or conduct and (b) to prevent those affected by a teacher under a plan for improvement from being subjected to prolonged substandard teacher. The school's argument was that the statute's purpose was more than fulfilled and that technical noncompliance should not be a basis for reinstating the teacher. The court agreed.[22]

Strict Compliance

The argument may be made that statutory deadline compliance is mandatory if the deadline is clear. That argument prevailed in Cave Springs Public School Dist. I-30, of Adair County v. Blair.[23]

In Cave Springs, the court held:

> Section 6-101(E) contains no ambiguities. It is written in explicit, mandatory language intended to preserve the rights of both the school district and the teacher. Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules

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[17] OK CIV APP 90, 983 P.2d 18 (Okla.Civ.App. 1998).

[18] *Id.*

[19] 70 O.S. 6-101.24(A)(2).

[20] 939 P.2d 1127 (Okla. 1997).

[21] *Id.*

[22] *Id.*

[23] 613 P.2d 1046 (Okla. 1980).

of construction, the statue will be accorded the meaning as expressed by the language therein employed.[24]

70 O.S. § 6-101(E) was reviewed by the Supreme Court of Oklahoma in Miller v. Independent School District No. 56.[25] In Miller, the Court held:

> Analysis of Section 6-101(E) demonstrates a legislative intent, and indeed a mandate that a teacher's existing written contract will renewed automatically by force of law if (1) Board has not either (a) entered in to a renewal contract or (b) notified teacher of nonrenewal by April 10th and, (2) if by April 25th teacher has not in writing notified Board, teacher does not desire to be reemployed.[26]

The statute contains no circumstances wherein a teacher is presumed to be rehired; the section mandates that the contract be renewed by force of law if the board of education has not notified the teacher of non-renewal prior to April 10.

Argument can be made that pursuant to 12 O.S. § 2006 the school district may have an extra day beyond April 10 in which to notify a teacher of the decision to non-reemploy the teacher. The statute refers to computing a period of time prescribed or allowed by any applicable statute. If the last day of the period so computed is a Saturday, Sunday, or legal holiday, then the last day of the time period shall be the next day that is not a Saturday, Sunday, or legal holiday. Some examples of periods of times governed by this statue include 20 days in which to file an answer to a petition, 12 O.S. § 2012, or 10 days from the date of a judgment in which to file a motion for new trial, 12 O.S. § 653. However, there is no period of time described in 70 O.S. § 6-101(E). The continuing contract statue deals with the extension of an annual teaching contract and clearly provides the school board must notify the teacher of a recommendation not to reemploy prior to April 10." 12 O.S. § 2006 does not provide a savings mechanism for the type of deadline described in 70 O.S. § 6-101(E).

Legislative Intent of Strict Compliance with the Statutory Deadline

The issue of legislative intent of the statutory deadline was addressed by the 10th Circuit Court of Appeals in Parker v. Independent School District No. I-003 of Okmulgee County.[27] In explaining the purpose of the TDPA, the court said:

> The Oklahoma courts have expressly recognized the public function served by the statutory tenure/due process scheme, which promotes good order and the welfare of the State and school system by preventing the removal of capable and experienced teachers for reasons arising solely from political or personal whim.[28]

In Parker, the school district had employed a teacher with a provision that said if her extra-duty coaching responsibilities were not renewed that her teaching position would not be renewed. This, in effect, attempted to contractually waive the requirements of the TDPA. The 10th Circuit found that such a waiver was contrary to public policy.[29] The defendant school district in Parker pointed out that the Oklahoma Supreme Court had permitted a school board to deviate from the statutory provisions of the TDPA by enlarging the teacher's procedural rights in Miller v. Independent School District No. 56.[30] The school district argued that because a deviation from the Teacher Due Process Act occurred in Miller, that the school district was free to deviate from the TDPA by including a waiver of the TDPA procedures in the teacher/coach's contract. The 10th Circuit disagreed and held the school district could not deviate from the TDPA to a teacher's detriment. The Court pointed out that the Oklahoma Supreme Court in Miller described the statutory notice provisions as "minimum standards."[31]

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[24] *Id.* at 1048 (Citing, Seventeen Hundred Peoria, Inc. v. City of Tulsa, Okl., 422 P.2d 840 (1966); Forston v. Heisler, Okla., 363 P.2d 949 (1961).

[25] 609 P.2d 756, 759 (Okla. 1980).

[26] *Id.*

[27] 82 F.3d 952 (10th Cir. 1996).

[28] *Id.* at 955.

In a recent unpublished case, Morrison v. Board of Education of Weatherford Public Schools, Case No. CJ-2000-112 in the District Court of Custer County State of Oklahoma, August 15, 2001, the teacher was notified by a letter written on April 10, 2000 that his contract would not be renewed. The teacher did not receive notification of the recommendation of nonrenewal by the board as required by the TDPA. In fact, the superintendent never made a recommendation to the board for the teacher's nonrenewal. The teacher was not notified prior to April 10th of the recommendation of nonrenewal other than a conversation that occurred a few days before April 10. Regardless of the school district's noncompliance with the TDPA's requirements concerning nonrenewal of the board failing to notify the teacher prior to April 10 in writing of the recommendation for nonrenewal the memorandum decision by the court found:

> . . . Summary Judgement is appropriate. Technical non-compliance should not be a basis for reinstating a teacher. House v. Ind. School Dist. I-29, 939 P.2d 1127. Substantial compliance by school district is all that is necessary. Non-compliance with the statute by the district was not significant and did not affect the rights of the plaintiff teacher, therefore the court sustains the defendant's school district's Motion for Summary Judgement and overrules the plaintiff's Motion for Summary Judgement.

Conclusion

The issue of whether mandatory statutory deadline compliance should be strict or substantial compliance depends on the circumstances of the case and interpretation by the court. Where the teacher fails to show substantial compliance results in a detriment to the teacher, the court will allow due process has been served. However, the argument can be made that where the mandatory statutory deadline is clear an unambiguous, due process requires strict compliance.

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[29] *Id.* at 954.

[30] 609 P.2d 756, 759 (Okla. 1908).

[31] Parker v. Independent School District No. I-003 of Okmulgee County, 82 F.3d 952, 956 (10th Cir. 1996).

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Thrash v. Board of Educ., of School Dist. 189, 435 N.E. 2d 866 (1982).

FUNCTIONAL BEHAVIORAL ASSESSMENTS: BEYOND STUDENT BEHAVIOR

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A functional behavioral assessment (FBA) is a method of evaluating a child who exhibits severe behavioral manifestations as part of their disability. Recently, evidence suggests that schools need to consider requiring a functional behavioral assessment (FBA) for all children requiring a multifactored evaluation (MFE) rather than only completing a FBA for children with severe behavior problems. In some instances a behavior problem is not the primary disability and note manifested at the time of the MFE. For example, what about an anxious child who is identified as learning disabled (with no FBA completed during the MFE) and after a period of a few years, even with intervention, he is academically behind becomes frustrated then begins to exhibit violent behavior as a means to cope with his failures. Was this part of the original problem and not determined because a FBA was not completed at the time of the initial MFE? Does the law suggest that the district is to be cautionary in their actions and prepare for a potential problem given he did demonstrate a degree of anxiety? Did the school district need to only consider the function of the learning disability or is the district responsible for attempting to evaluate the function of other behaviors, although not severe, that can be influenced by the learning disability? Given that a FBA, in theory, was not designed exclusively for children only with severe behavior problems why not carry out a FBA for all students to determine what is the function of behaviors (academic and social) that accompany the disability since it is almost next to impossible to determine if they do indeed contribute to the disability unless they are studied?

In the 1997 reauthorization of IDEA , criteria for evaluation procedures notes that the "local educational agency shall use a variety of assessment tools and strategies to gather relevant functional…information" [1] and **does not** limit gathering functional data only for children with behavior problems, but for all children with disabilities. It behooves districts to consider a FBA (and subsequently a behavioral intervention plan [BIP]) when completing a multifactored evaluation for all children with disabilities "rather than waiting for a behavioral incident before conducting an FBA and designing a BIP."[2] In an attempt to be preventative districts can demonstrate that they are proactive in dealing with "potential" behavior problems.

New York State[3] provides guidelines for implementing a FBA that are inclusive to all disabilities rather than focusing only on students with behavior disorders or waiting for a behavior to occur and then complete a FBA under a compressed timeline.[4] If a child has a FBA completed then the IEP only needs to "review the plan and modify it, as necessary to address the behavior."[5] Furthermore, New York State suggests "functional behavioral assessments should be integrated, as appropriate, throughout the process of developing, reviewing and revising a students IEP when students demonstrate behaviors that impeded learning. This will ensure that functional behavioral assessments are conducted appropriately in all situations to address needs as well as situations in which administrative or legal proceedings may be encountered."[6] Although the State does not require a FBA for all students with disabilities it does recommend a FBA when appropriate for students whose behaviors may impede their learning. In essence, extending beyond the focus of severe behavioral disorders and considering students with other disabilities (mental retardation, learning disabilities, hearing impairment etc.) that also might display behaviors that impede their learning. Any student who requires goals to work on behavior in addition to their primary disability can benefit from completing a FBA and then subsequently a BIP.

In addition to expanding the scope of using a FBA across disabilities, districts need to consider using the process to safeguard schools against children at-risk of violent behaviors not associated with a disability. A FBA is not exclusive to special education, but a pragmatic approach to looking at a child's behaviors, trying to get at the root of inappropriate behavior, and then changing the environment to increase appropriate behaviors and decrease less desired behaviors.[7]

Many school districts across the country are taking aggressive measures to provide students and teachers with a safe school environment (e.g., zero tolerance policies, extra security measures, etc.). By implementing a policy that uses FBA, districts can educate personnel on the procedures for making systematic observations of all students to better identify children at-risk of engaging in violent behavior.

In order to prevent violent behaviors it is important to understand the early behavioral warning signs. According to Dwyer, Osher, and Warger [8]children who become violent feel victimized and rejected. These children tend to exhibit aggressive behavior early in life and if not given support and intervention it progresses to severe aggression and violence. Warning signs alone are not sufficient for predicting aggression and violence, but can serve as a base for supporting these children with intervention, which may include, a modified functional behavioral assessment in the early years. The warning signs include: social withdrawal, excessive feelings of isolation and rejection, feelings of being picked on, low school interest and poor academic performance, violence in writings and drawings, uncontrolled anger, patterns of impulsive and chronic hitting, intimidating, and bullying behaviors, history of discipline problems, past history of violent and aggressive behavior, being a victim of violence, intolerance for differences in others, prejudicial attitudes, drug use and alcohol use, affiliation with gangs, access, possession, and use of firearms, and serious threats of violence. If educators are trained in FBA to make systematic observations and then worked toward an understanding of why a child is engaging in troubling behavior they can intervene prior to the occurrence of fatal or highly volatile behaviors.

Given the many responsibilities of school districts and educators, implementing an additional requirement is not likely to be held in high regard. Nonetheless, it behooves districts to adopt prescriptive policies and guidelines for implementing FBAs and BIPs to avoid litigation as well as the consequences of a student at-risk of violent behavior going unnoticed. Districts are more likely to implement polices that are streamlined, cost efficient, and require minimal additional staff training. Suggestions for making the most of current resources while expanding the scope of FBAs (i.e., completing for all students with disabilities and consider use with students without disabilities, but at-risk for violent behavior) include the following:

1. Conduct a FBA as part of the MFE for all students. Much of the data collected for a FBA can easily be gathered as information is obtained for the primary disability (e.g., rating scales, checklists, interviews, and observations).

2. Rather than providing intense training to all staff, assign one professional (e.g., school psychologist, special education coordinator, social worker) to become the expert who can then in-service others and provide on-going technical support.
3. Use intervention assistance teams to make systematic observations of children at-risk of violent behavior and gather data to determine the "function" of the behaviors.
4. Select materials that are comprehensive, yet concise. Including one standardized measure that is quick and easy to administer balanced with formal, observations across settings provides a balanced profile without being overly time consuming.
5. Use data from the FBA to design a BIP. Included goals on the BIP that specifically relate to "why" a student engages in troubling behavior (e.g., anxiety disorder, domestic violence) rather than only goals relating to the observable symptoms (e.g., hitting, kicking, spitting etc.).

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[1] 20 U.S.C.§ 614(b)(2)(A).

[2] See Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment Process Without Procedure*, 2 Brig. Young U. Educ. & Law J. 217 (2000).

[3] http://nt5.nysed.gov/vesid/p9805.htm (April 25, 2001)

[4] 20 U.S.C.§ 615 (k)(1)(B)(i). If a child engages in behavior that warrants suspension or expulsion; hence, a change of placement for a student with a disability "either before or not later than 10 days after taking disciplinary action…if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension…the agency shall convene and IEP meeting to develop an assessment plan to address that behavior."

[5] 20 U.S.C.§ 615 (k)(1)(B)(ii).

[6] http://nt5.nysed.gov/vesid/p9805.htm (April 25, 2001)

[7] *See* Dieterich & Villani, *supra* note 2 at 211. "Functional behavioral assessment is an approach that incorporates a variety of techniques and strategies designed to diagnose the causes of the behavioral problem and to develop intervention strategies. It goes beyond the visible behaviors and focuses on identifying social, biological, affective, familial, and/or environmental factors that trigger or sustain the behavior. A purpose of functional assessment is to gain knowledge of situational or so-called 'setting events,' the contextual conditions that increase or decrease the power of individual environmental stimuli. Professionals must then implement methods to determine which events in the child's environment are likely to increase or decrease the occurrence of the undesirable behavior."

[8] *See* K. Dwyer, D. Osher, & C. Warger, *Early warning, timely response: A guide to safe schools.* U.S. Department of Education (1998).

GIFTED STUDENTS: AMERICA'S MOST UNWANTED

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Gifted Students:

America's Most UNwanted

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This presentation will provide an overview of governmental mandates, constitutional issues, state policies and practices in regard to gifted education. Starting with the foundations and current practice of American gifted education, further information about program testing, identification, and admissions will be discussed. A brief review of current civil court and Office of Civil Rights cases are included.

I. Historical Antecedents of Gifted Education In the United States

A. What is intelligence? Who is gifted?

Based on standardized achievement scores, 95-97% percentile achievement. Marland Report (1969) definition expects 3-5% of general population will be gifted. J. Renzulli's testing of

B. Lewis M. Terman (1924) , Identification of Genius

Longitudinal studies to track gifted students, as identified by Stanford-Benet IQ

C. Pre and Post Sputnik

Start of federal government and higher-education emphasis on talent (academic) identification.

D. "Matthew" effect

Based on a bible analogy - students who have high intelligence receive the best school offerings.

E. "Multiple Intelligences" - "Frames of Mind"

Howard Gardner's work impacts identification and admission criteria to gifted programs.

F. J. Renzulli - Creativity and Task Determination

II. Governmental Definitions and Mandates for Gifted Education

A. National Defense Education Act, 1958

B. Sidney Marland (U.S.Commissioner of Education) Report, 1971

C. Section 504 of Rehabilitation Act of 1973

D. U.S. Office of Gifted and Talented established, 1972

E. Education Professions Development Act, 1972

Establishes National Leadership Training Institute for the Gifted and Talented

F. Public Law 93-380 provides first federal funding of gifted education.

G. Jacob Jarvits Gifted and Talented Students Act, 1989.

H. Individuals with Disabilities Education Act, 1990 (IEP for gifted stdeutns)

I. " A Case for Developing America's Talent", U.S. Department of Education report, 1993

III. Current State of Gifted Education in America

A. State-wide gifted education identification definitions -

1. Five states do not have a state-wide definition of gifted students

2. 21 states have revised gifted definitions since 1990

3. Majority of states use a modified (1978) Marland definition for identification

4. Only Wisconsin uses the Jacob Jarvits definition

5. Only Arkansas uses the Renzulli definition

6. Most states use a combination of identification formats

a. teacher referral

b. parent referral

c. peer recommendation

d. self-assessment

e. IQ testing or state standardized tests scores

B. State-wide mandated programs

1. 48% of states that have a formal identification process offer special programs

2. 17% of states mandate schools to identify gifted students - see Attachment A

3. 4% of states mandate school programs for the gifted.

C. State-wide funding for gifted education

1. 71% of states allocate some funding of gifted education

2. 19% have decreased their funding in the past ten years

3. 2/3 of the states fund gifted education under special education p[programs

4. Only 5% of states offer identification or enrichment placement of preschool gifted students

5. 26% of states have not changed their gifted education funding levels since 1996.

IV. Federal Cases - Constitutional Issues

A. 14th Amendment - Equal Protection Under the Law

1. Three-pronged test

a. History of discrimination

b. Attribute is easily recognizable

c. Characteristic is immutable

2. *Bennet v New Rochelle School District*, 497 N.Y.S. 2nd 72 (1985)

Protection status for gifted students

3. *Wright v Ector County Independent School District*, 867. S.W. 2nd 863 (Tex. App. Ct. 1993)

Early admission to school program.

4. *Broadley v Board of Education*, 639 A 2nd 502 (Conn.1994)

Advancement to higher grade level

B. Due Process - liberty or property right to appropriate education

1. Use of school appeals plan.

2. Mediation - 50% of states have prescribed steps regarding gifted education.

3. Investigation by Office of Civil Rights

C. Ist Amendment - Religion/Gifted Issues

1. *Bradstreet v Sobol*, 650 N.Y.S. 2nd 402 (N.Y. App. Div 1996)

Access to extra-curricular music offerings for home-school (religious) gifted students

2. *Swanson v Guthrie School District No. 1* 942 F. Supp. 511 (W.D. Okla. 1996)

Access to extra-curricular sports offerings for home-school (religious) gifted students

D. Civil Rights -

1. Office provides valuable service for parents of gifted students

a. 86 times in the past ten years the OCR has filed Letters of Findings involving gifted

b. 52 times the school districts were in compliance

c. Major issues involve the identification and admission to gifted education

d. May be filed by parents or legal representative

2. Civil Rights issues in gifted education

a. *Rosenfeld v Montogery County Public Schools*, 41 F. Supp. 2nd 581 (D.Md.1999)

Admission to program by less qualified student

b. *Keyes v School District No.1*, 902 F. Supp 1274 (D. Colo. 1995)

Racial balance in selection process

c. *Hampton v Jefferson County Board of Education*, 102 F. Supp. 2nd 358, 2000 U.S.

End use of racial quotas

V. State Statute and School District Policy Challenge

A. Early admissions to school programs

1. *Wright v Ector County Independent School District*, 867 S.W. 2nd 863 (Tex. App. Ct. 1993)

   Early admission to school program

2. *Broadley v Board of Education*, 639 A 2nd 502 (Conn.1994)

   Special education statutes classify gifted students as "exceptional" children

B. Curriculum modification required for gifted education

1. *Huldah A. v Easton Area School District*, 601 A. 2nd (Pa. Commw. Ct. 1992)

   Effectiveness of pull-out program vs in-class enrichment.

2. *Brownsville Area School District v Student X*, 30 IDELR 866, 2843 C.D. 1998 (Pa. Comm.

   School district responsibilities limited to current offerings within the curriculum

C. Gifted children with additional disabilities

1. *Conrad Weiser Area School District v Department of Education*, 603 A. 2nd 701 (1992)

   Learning disabled students with higher than average IQ seeks gifted education

2. *Fowler v Unified School District No. 259*, 900 F. Supp. 1540 (D. Kan. 1995).

   Hearing impaired, private school student seeks interpretative services by public school

3. *Board of Education of the City School District of the City of Syracuse*, 33 IDELR 257 (SEA NY 2000)

   Learning-disabled gifted student does not require an IEP.

D. Section 504 students

1. *Howard County Schools*, 33 IDELR 193 (OCR. 1999)

   Student with serious behavioral problems denied gifted education

2. *J.D. by J.D. v Pawlet School District*, 33 IDELR 34 (2nd Cir. 2000)

   Gifted student denied access to special education status

3. *Quaker Valley School District*, 31 IDELR 225 (SEA PA 1999)

   IEP for gifted students does not address social, emotional, behavior needs

4. *Los Angeles Unified School District*, IDELR 71 SN 985-98 (SEA CA 1999)

   Serious depression as special education disability

VI. Millennium Issues in Gifted Education.

A. Gifted/Religious connections

B. Low Socioeconomic student identification for gifted education - See Attachment A

C. Misrepresentation of education program for gifted students

D. Quotas for minority representation in gifted education placement

E. Teacher certification

F. Availability of program options - See Attachment B

G. Cessation of programs

Attachment A

Identification Procedures for Gifted and Talented Students

How does poverty impact selection for gifted programs?

Identification elements	Poor Students
Multifaceted Testing	Students may have high absentee rates Expensive process not for marginal
IQ - 130 or above	Language dominant, general knowledge Super domain of cognition - top 1-3%.
Creativity Tests	Torrance/Renzulli Common vs Creative
Talent Development	Represents big financial investment Cultural importance of talent Students with disabilities classified
Academic Success	Gender issues Cultural issues Family loyalty
Behavioral Checklists	Self report- perfectionism Parents - may need interpreters distrust school authorities survival level may not be aware of child's gift
Teacher referral (70% of school districts)	Behavior problems do not inherently recognize gifted Low expectation for poor youth

Attachment B

Common Formats for Gifted Education

In-classroom enrichment
Magnet school
Cluster
Pull-out program
Computer-assisted instruction
Summer programs in university setting
Ability grouping
Cross-age grouping
Grade acceleration
Inter-district cooperation
Mentoring
Individual Research Projects
Curriculum enrichment (International Baccalaureate)

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TEACHER-STUDENT CONFIDENTIALITY: A CONTINUING AND EMERGENT DILEMMA

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TEACHER-STUDENT CONFIDENTIALITY
A CONTINUING AND EMERGENT DILEMMA

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> *When the risk of death to a child is balance's against the burden sought to be imposed on the counselors, the scales tip overwhelmingly in favor of duty. Certainly the physical component of the burden on the counselors was slight. (The parent) claims only that a telephone call, communicating information known to the counselors, would have discharged that duty here. We agree.* Eisel v. Board of Education of Montgomery County, 324 Md. 376, 597 A.2d 447 (1991).

> *Perhaps it is part of the American tragedy that we rely on courts , as we do on schools, to cure almost every problem.* Zirkel, *Another Case of Student Suicide*, 77 Phi Delta Kappan 91 (1995)

I. Introduction

As societal pressures continue to force the social problems of students into the educational setting, students often reveal, either directly or through second hand conversations with peers, critical matters which may affect their health and safety or the health and safety of other students. In our legal system and to some degree in the eyes of students, teachers, counselors and administrators are often seen as standing in *loco parentis*, both literally and figuratively. Students reveal facts about themselves or other students which they believe will remain confidential between themselves and teachers or others in the school setting, but which could radically affect their health, welfare and safety. These issues include potential suicide, pregnancy, drug use, criminal activity, alcohol or drug use, abuse by parents or others and eating disorders. How a school and its personnel deal with these issues, particularly those which must be communicated to the parent or guardian, will often determine the success in managing the situation and, just as importantly, may determine whether any liability will attach to the individual, the school, or the school district.

II. Beginnings

On a chilly and overcast early Fall day in 1988, Nicole Eisel, a thirteen year old student at Sligo Middle School in a prosperous suburb of Washington, D.C. consummated a murder-suicide pact with another student. Nicole had become involved in Satanism, causing her to have an obsessive interest in death and self-destruction. In the week before she was killed by the other student in the murder-suicide pact in a public park near the grounds of the middle school, she told several friends and fellow students that she intended to kill herself. It was alleged that some of these friends reported Nicole's intentions to their school counselor, who in turn relayed the information to Nicole's school counselor. The two counselors jointly questioned Nicole who, as do most adolescents, denied any suicide ideation and further denied telling her friends or other students about these thoughts. The counselors made a fateful decision and did not tell either school administrators or, more importantly, Nicole's parents.

While the facts were disputed and while the case was eventually remanded, the Court of Appeals of Maryland was confronted during its September Term of 1990 with a case of first impression. Eisel v. Board of Education of Montgomery County, 324 Md. 376, 597 A.2d 447 (1991). Whether liability should attach to the counselors actions for not notifying the parents was virgin ground, not only for Maryland law, but also with respect to imposition of such a duty by any other court in the United States. In Eisel, the Court, after recognizing the traditional doctrine of in *loco parentis* focused on the issue which has become the central issue in all such cases - that is, whether there is a duty to communicate the information possessed by the school, its teachers, counselors or administrators to the parent or guardian of the child regarding issues, such as suicide, which could have a devastating impact upon the health, safety or welfare of the student.

The Eisel Court found that the most important variable in the determination of duty was the question of foreseeability, that is, whether Nicole's suicide was foreseeable because the defendants allegedly had direct evidence of Nicole's intention to commit suicide or otherwise participate in the murder-suicide pact. Answering in the affirmative, the Court cited a number of state, county, and school policies which instructed staff as to how they could help in a suicidal crisis. The most telling of these policies were, as one might expect, directed towards rapidly communicating the issue to parents, teachers, administrators and others. In addition to forming a crucial part of the Court's opinion, these are the benchmarks from which the discussion flows:

> *Confidentiality is not an issue-it makes far more sense to pick up the pieces of a teacher/pupil relationship after the crisis is over.* Eisel, 597 A.2d 454 (1991).

and

> *Tell others–as quickly as possible, share your knowledge with parents, friends, teachers or other people who might be able to help. Don't worry about breaking your confidence if someone reveals suicidal plans to you. You may have to betray a secret to save a life.* Id.

After finding that there was a close and causal connection between the failure to inform the parent and the injury, the Court moved the central analysis of the case to discuss the relative burden upon the counselors. Finding that the burden on the counselors by telling the parent was slight as compared to the overwhelming and devastating consequences if the suicide was carried out, it found sufficient legal ground to establish a duty in Maryland for counselors, teachers or administrators to use reasonable means to attempt to prevent a suicide when they are on notice concerning the adolescent's suicidal intent. Most critical, the Court dismissed the idea of confidentiality between student and counselor. In terms which were not evocative, but were clear, the Eisel Court said:

> *The counselors argue that there are elements of confidentiality and discretion in their relationships with students that would be destroyed by the imposition of a duty to notify parents of all reports of suicidal statements. Confidentiality does not bar the duty...policy explicitly disavows confidentiality when suicide is the concern.* Id. at 455.

III. Current state of the law

Describing the current state of the law, it is necessary to break it into broad categories regarding public and private institutions. Additionally, prior to determining whether a duty of notification exists, such that failure to notify the parents will bring liability upon a school, school district or employees, it is also necessary to discuss generally the threshold issue of governmental immunity with respect to public institutions and charitable immunity with respect to private institutions.

A. Public institution.

1. Sovereign/governmental immunity.

Whether or not a duty exists, or whether it has been breached, is often irrelevant to the extent that full or partial governmental or sovereign immunity precludes suit against either the district or the teacher, counselor, administrator or other staff member involved. Governmental immunity can take two principal forms, either full, which bars suit against both the school or school district and its employees, or partial, which usually immunizes only the school or school district.

In confronting the issue of whether liability will attach for failure to notify parents or otherwise prevent a suicide, some courts have taken the position that, despite the duty or any facts which might trigger it, both the school district and its employees are immune from liability. Brooks v. Logan, 130 Idaho 574, 944 P.2d 709 (1977).

In other instances, courts have rendered partial governmental immunity by immunizing the district and its officials while at the same time imposing liability upon the employees of district, including teachers, counselors or administrators. Often times, the rationale for this distinction is that the school district, school board or other officials are exercising governmental or discretionary powers, while the employee is exercising ministerial measures. Hickey v. Zezulka, 439 Mich. 408, 487 N.W.2d 106, reh den 440 Mich. 1203 (1992). In Hickey, suit was brought by the father of a college student who hung himself with his belt and socks from a metal bracket during detention in a holding cell while awaiting transportation to a county jail. The student had been detained for driving while intoxicated. No personal articles or personal clothing were removed from him and the officer failed to check on him during the forty (40) minutes of confinement. Id. Finding that the college security officer's actions were ministerial in nature, the court refused to allow the officer to raise a defense based upon state governmental immunity, but did allow the university to do so because it was performing a governmental function in its activities. Id. Similar rationales have been used in other states. Fowler v. Szostek, 905 S.W.2d 336 (Tex. App. 1995).

In addition, state statutory limitations can protect school employees, even where they are not protected by governmental immunity, from judgements over a specified amount. In Eisel, the Court noted that, even if the counselors were found liable, the county board of education and its employees were only liable for torts which were not malicious or grossly negligent, up to $100,000 above which amount governmental immunity could be asserted. Eisel v. Board of Education of Montgomery County, 324 Md. 376, 597 A.2d 447 (1991); MD Cts.& Jud. Proc. Code Ann. Section 5-353(e).

2. Duty to prevent suicide or notify parents.

Subsequent to the finding in Eisel, cited above, some, though not most states, have weighed in on whether a duty exists to actively prevent suicide or to notify the parent or guardian of threats.

a. Duty found. In addition to Eisel, several of Maryland's sister states have found, to one degree or another, that a duty exists to actively prevent suicide or to notify the parents.

In a light similar to Eisel, the Eleventh Circuit found with respect to a Florida school that, while there was no active duty to attempt to preclude the suicide, officials did have a duty to notify the parent of a student's suicide attempt at school. Wyke v. Polk County School Bd., 129 F.3d 560 (11th Cir. 1997). As in many cases, including Eisel, the Wyke Court remanded the case for determination by a jury as to the question of whether the district was causally at fault for the student's subsequent suicide sufficient to trigger damages for the mother.

In Hicky, cited above, the Michigan Supreme Court, after finding that governmental immunity did not bar suit against the employee, found that the campus security officer owed a duty to protect the student from harm. 439 Mich. 408. The Court based a portion of its holding on a belief that there was a special relationship between the parties, particularly once the student was detained. Id.

A more limited duty has been extended to mental health professionals dealing with students with respect to the prevention of suicide and appropriate notifications in South Carolina. Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993)

b. Duty Not Recognized. A number of courts have failed to find such a duty involving suicide, including the requirement of schools and their employees to notify parents of prior indications or threats. They have done so for a wide variety of reasons.

In perhaps the most strident finding of lack of duty, the Supreme Court of Iowa in Jain v. State, 617 N.W.2d 293 (2000), found that knowledge by a university of a student's prior suicide attempt imposed no duty upon the university to inform the student's parents, despite the fact that the university had a policy notifying parents when a student was found to engage in self-destructive behavior. The primary rationale was that any intervention by the university would not have otherwise increased the student's risk of suicide Id.

Liability has also not been imposed where a student was not in the school's care and custody, despite what the school might have known during the custodial period. Armigo by and through Chavez v. Wagon Mound Public School, 159 F.3d 1253 (1998). Wisconsin has held similarly in McMahon v. St. Croix Falls School District, 228 Wis.2d 215, 596 N.W.2d 119 (1999).

B. Private institutions

As a general rule, fewer cases have been adjudicated with respect to private institutions. The Eisel case, though not specifically extended, is probably applicable to both public and private institutions in the State of Maryland, as may be limited by the doctrine of charitable immunity. As is often the case, where charitable immunity continues to exist, the employee and the school will not be liable to the extent the school maintains minimum statutory insurance coverage. In addition, states such as New Jersey which continue to recognize complete charitable immunity, preclude any liability with respect to failure to prevent suicide or notify parents. Shultz v. Roman Catholic Archdiocese, 95 N.J. 530, 472 A.2d 531(1984). While not imposing liability in the particular case, the Virginia Supreme Court has also recognized that the duty to inform parents is applicable to private institutions. Seidamen v. Fishburne-Huggins Educational Foundation, Inc., 724 F.2d 413 (1994)

IV. **Value of notification**

In her excellent article on the rationale for disclosing adolescent suicidal impulses to parents as opposed to protecting the confidence of the child, Joan Neisser has identified several public policies which would support parental notification. The are as follows:

A. Family pathology. Most suicidal adolescents are mentally ill and their illness is often linked to family pathology. This speaks to family involvement to assure appropriate treatment.

B. Preservation of the family unit. Harkening, to some degree, to the arguments made in a number of cases, parental involvement is important to encourage familial unity and confidence.

C. Family values. As a corollary to integrity of the familial unit, notice allows parents an opportunity to take such steps to protect or treat their child in ways that are consistent with their family values. This allows the input of religious or cultural traditions.

D. Choice of Services. Notification allows parents to make a decision or, if appropriate, participate in the decision which chooses a mode of treatment which is best for the child and which the parents are able to afford.

E. Home environment. Notification of the parent allows the parents to sanitize the home environment to avoid potential risks. This might include removal of firearms or other dangerous instrumentalities that might be immediately useful for a suicidal child.

F. Parental protection and support. After notice by the school the parents have the ability to help prevent a suicide or other adverse behavior of their child. This is, again, a corollary to some degree of the arguments advanced in some case as to the fundamental rights of the parents to protect and nurture the child. Neisser, Joan *Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence?*, 26 Ind. L. Rev. 433 (1993).

V. **Required Notification for Risks Beyond Suicide**

If one takes the holding in Eisel to its logical extension, it is apparent that there are other matters affecting children for which a duty may be imposed to notify the parent. Eisel was decided on a risk analysis weighing the minor inconvenience of a phone call and the breach of a perceived confidence as against the loss of the life of a child. Other matters which may come to the attention of teachers, counselors, administrators and or staff from perceived confidential revelations by students and which would have a potentially disastrous impact upon their health and welfare would include:

A. Drug abuse

B. Alcohol abuse

C. Criminal activity

D. Pregnancy

E. Sexual Abuse, particularly by a school employee

F. Eating disorders

The final question presented then is how do we teach those at the front lines- teachers, counselors and staff-to appropriately recognize what cannot be deemed confidential and to communicate it appropriately in the best interests of the student and in order to reduce their own liability and that of their school or school district.

VI. Training Models

Too often, we fail to educate those on the front lines, including our teachers and other staff, as to how to deal with confidential matters brought to them by students. Often times no policies are in place or the policies are sterile in concept and provide little or no guidance as to the specific situations which may arise. The situations which pose severe risk to children, including suicide threats, drug and alcohol abuse, pregnancy and the like are recurrent situations in today's educational setting. Additionally, as these issues move into the schools, students often confide in their teachers and other school staff. In training teachers and other staff we should remain cognizant of the following:

A. Training should be specifically directed to remind teachers and other staff that certain matters cannot remain confidential between themselves and the student. Training should emphasize that failure to reveal the perceived confidence could have devastating effects on the student and, in liability terms, on the teacher and the school district.

B. Training should be situationally based and should, to the extent possible, be refreshed on a regular basis to assure that the situations presented for consideration and for application of the principles of parental notification are current to those issues arising in the school. A sample of training scenarios is attached as Appendix I..

C. Situational based training should be integrated with clearly written and usable school policies regarding those instances in which the revelation by a student requires notification of school administrators and parents. Some of these required notifications will be based on statutory requirements, such as those instances where child abuse or child neglect is suspected by an educator or where such abuse or neglect has been revealed by the student or his or her peers. To the extent possible, forms should be provided with the policies which provide the basic data and a record of the notifications. In addition, all relevant names, contact addresses and phone numbers should be included. These may include the specific individuals or titles of individuals within the school who should be notified prior to parental notification based upon the school's governance model. It may also include available resources which the teacher or other staff may tap, including school psychologists, crisis managers or counsel. To the extent possible, training of teachers and other staff should be interdisciplinary, incorporating psychologists and counsel.

D. It should be emphasized to teachers and other staff that they are professionals and that their professional judgement, tempered by training and common sense, can appropriately address the vast majority of these problems in order to minimize risk to the student, to themselves, and to their schools.

APPENDIX I

(Sample Situational In-Service Training Scenarios)

ANOTHER DAY AT THE BIG B

It is September again and having survived the first week of school, you arrive to greet the first dreaded Monday morning of the school year. After having found your own reserved parking place available -a miracle in and of itself- and after having run the gauntlet of parents dropping off the little ones, you enter the building and are greeted with the following:

- Jane, a third grader, comes running up to you in tears. It seems that Mary has confided to her on the bus on the ride to School that last night she broke her mom's favorite Tiffany Lamp. Mary has told Jane that Mary's mother became enraged and hit her three times with the cordless phone that was in her hand. On the bus, Mary has shown Jane the bruises and welts that were caused but are otherwise covered with the long sleeve shirt her mother has forced her to wear to school. What, if anything do you do to determine if this is true? Do you talk with Mary, who is in your first period class, or send her elsewhere? Are you required to report to anyone outside of the school? If so, to whom are you required to report and how?

  (Allows discussion and training on statutory requirements for reporting child abuse or neglect, including the appropriate individuals in the school administration and in local or state social services or police, as required. Also affords an opportunity to discuss when not to undertake parental notification if subject of abuse is parent or guardian. Allows you to discuss policy, including reporting forms and records.)

- After you have dealt with Mary, you are relieved to start your first period class. Even though it is not your favorite subject - the Kellogg-Briand Pact - you plunge ahead secure in the knowledge that this is safer ground, particularly as both Kellogg and Briand are long since dead. This feeling of euphoria lasts about five minutes until you drop your notes. While picking up your notes, you notice that both of Jenna's ankles are horribly bruised. Fresh from your experience with Mary, you immediately go through all of the reporting steps. Fortunately, for everybody but you, it turns out that Jenna is a field hockey player, albeit not a very good one. In addition to being hit about the ankles by opponents sticks, she constantly trips over her own and bruises herself. You are relieved until you receive a phone call just before lunch from a lawyer who represents Jenna's parents. And, guess what? He is suing you for everything you have on grounds of defamation and intentional infliction of emotional distress. Should you be worried or should you just jump off the top of Founder's Hall now?

(Allows for a discussion as to any state provisions which grant immunity to educators who in good faith make an inaccurate notification as to suspected abuse. Allows discussion of the need to notify administrators and/or authorities based upon good faith suspicions and to err on the side of notification.)

- After you decided that jumping off the top of the building was not going to help, you repaired to the "cafetorium" for a light repast. There you overheard one of your colleagues discussing a disturbing incident. When he passed by a darkened classroom in North Hall, he spied another colleague locked in a passionate kiss with an 11th grade student. Your colleagues have agreed to keep silent long enough to consider how to approach the teacher and then to let the teacher agree to stop without any further reports. What do you do? Who should you tell? Who are you required to tell?

  (Allows discussion of sexual abuse, particularly as between a school employee and a student. Allows discussion of notification to school officials and, either directly or through school officials, to parents. Emphasizes that, despite relationship with colleague, notification to authorities and parents is required.)

- While considering your options and watching the intellectual and civilized discussions of the 7th graders at your table, you spy Annie. She has wolfed down her food along with seconds and thirds. You noticed this behavior last week as well and, when you inquire, she tells you that her parents decided to stay in Jamaica for an extra week and there is no food, no parents and no money in the house. Is this child abuse? Are you required to report it? To whom?

  (Allows discussion of the subject of neglect and risk factors. Allows for discussion of use of additional school resources including school psychologists and school nurse. Reinforces the discussion on need for notification.)

- Lunch mercifully over, you start the short walk back to your classroom. As you pass a darkened niche in the hallway, you overhear Kendra and Marcie, both seniors. Both have applied to Harvard on early decision. The acceptances are due in the next day or two. You overhear Marcie and Kendra crying and huddled in the corner. From what you can hear they have apparently agreed that if they both do not get into Harvard, their lives will be miserable and meaningless. Then you overheard Marcie drop the bombshell. If the acceptances do not come for both, they have agreed that Marcie will shoot Kendra and then Marcie will shoot herself.

(Allows for discussion of parental notice on suicide threats. Allows for discussion of other intervention strategies and discussion of notification to administrators and other individuals available to assist.)

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Working Together: Interdisciplinary Collaboration between Educational Administration and Law Students for the Benefit of Education

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INTRODUCTION

As education becomes more litigious, it is imperative that educators have an extended knowledge of law as it pertains to learning institutions. Jay P. Heubert (1997) explains in detail the complimentary needs for the school attorney's extended knowledge of education, as well as the educator's knowledge of the law as it pertains to his or her school. Within the collaborative framework of educational law on a professional level, Heubert calls for greater interdisciplinary work on the part of educators and legal professionals alike.

Furthermore, Chancellor David Ward (1999), University of Wisconsin – Madison, writes in his vision of the UW Strategic Plan that, "Boundaries once drawn to define and protect disciplines need to be redrawn to promote interdisciplinary work." It is in this educational context that Chancellor Ward encourages greater collaborative work across disciplines and across the university landscape at large.

To address these professional and academic calls for greater collaboration, law courses offered through the University of Wisconsin - Madison's Department of Educational Administration (Legal Aspects of Elementary and Secondary Education, Legal Aspects of Higher Education, and Legal Aspects of Special Education and Pupil Services) are also listed as electives in the School of Law. This structure allows for a mix of students from both disciplines to explore topics of education law together. It also creates opportunities for students to collaborate inside and outside of the classroom to share their unique perspectives on education and the law.

This paper explores the advantages of the collaborative process with a primary focus on the students' perspectives on structuring this type of learning environment. Students share their experiences crafting programs that allow for dual degrees (J.D./Ph.D. or J.D./M.S.) and Ph.D. minors in law, as well as discuss how this collaboration influences research topics and approaches for those completing dissertations. The paper also addresses the overall implications this collaboration could have on practice (both legal and administrative) in the future.

INTERDISCIPLINARY CLASSES AT THE UNIVERSITY OF WISCONSIN-MADISON

The University of Wisconsin-Madison's Department of Educational Administration currently offers three classes focused on education law: Legal Aspects of Elementary and Secondary Education; Legal Aspects of Special Education and Pupil Services; and Legal Aspects of Higher Education. In any given semester, 27 classes are offered by the department, of which two are courses in education law. Generally, Legal Aspects of Higher Education and Legal Aspects of Special Education and Pupil Services are offered during alternating semesters. Legal Aspects of Elementary and Secondary Education is offered both fall and spring semesters. All three education law classes are capped at twenty-five seats. Of these twenty-five, eighteen are reserved for School of Education students and seven are offered to law students.

In the Department of Educational Administration, approximately 66% of master's and doctoral students are full-time professionals working as teachers or school administrators in Wisconsin. The other 34% are full-time graduate students, many of who are former teachers or school administrators. As a result, most of the students in the Department of Educational Administration bring a wealth of experience in education to the university classroom. In real world terms, they know what teaching and administration is really like in today's schools and can share that experience with law students who are interested in education law. Current administrators and teachers have a vast knowledge of the current trends in education. In the past several years terms such as standards, charter schools, and merit pay have become part of the jargon of education. While law students have a vast understanding of how to interpret the law, the practical implications of the application of new initiatives is hard to understand by the law students, who typically are completely removed from a school setting. The educators in the class bring a great knowledge of the application of the complexity of the current law into the classroom. The teachers and administrators have an understanding of the potential political issues that could arise from application of the law in the school situation.

For law students in education law courses, the first year of the law degree program at the University of Wisconsin is filled with required classes. By the time a law student is eligible to enroll in a joint class, he or she has completed at least 30 credits of legal course work in the law school. Therefore, each law student enrolled in a joint course has a working understanding of the judicial system, and a more focused knowledge of law than the average graduate student. When entering a joint class, law students have already taken a torts class and therefore have heighten awareness of liability. In addition, many have taken a constitutional law class which gives them a broad sense of the constitutional issues presented in an educational law course. Law students have also taken extensive legal research and legal writing classes which enable them to write an accurate legal analysis's versus a more traditional research paper that most graduate students are required to write in their studies.

Typically, law courses at the University of Wisconsin, Law School are taught in lecture format, with an exam or term paper at the end of the semester which accounts for most of the student's grade in the course. Legal education in the law school can seem a bit "surreal" at times (except in clinical courses), because students are taught in theoretical terms with little regard to practical application. Sharing a class with professional and working educators allows law students to witness much of their legal training in practice.

Education law instructors create a collaborative learning experience for law students and educational administration students by drawing on the inherent strengths of each group. By tapping into the law students' legal knowledge, coupled with the practical knowledge of the educational administration students, the instructor is able to create a forum in which each student is able to share his/her perspective and experiences. With regards to the general operation of the class, the assignments, requirements, and expectations for all the students are essentially the same. In one class there is a library research assignment that differs for law and education students and the instructor tailors the requirements to meet each student's needs.

The legal training law students bring to the education law classroom allows them to first operate as a kind of teacher to the professional educators regarding the basics of the legal process, and then to operate as learners with regards to how the process actually takes shape in a K-12 school or higher education setting. Law students provide valuable tools to the educational administration students in that they are able to share techniques in reading, comprehending, and interpreting court cases as well as interpreting judicial language. The teachers and administrators have vast experience and a practical knowledge of schools, which they bring to courses. By attending a joint educational law course, the law students are also given the opportunity to move from more theoretical education in their last years of law school, to learning how to address the practical, legal problems in today's schools. While teachers take their practical knowledge and apply it to legal concepts. This symbiotic relationship creates a unique environment for both kinds of students in the joint classes offered by the university.

During the semester the two groups of students not only are placed in a course together, they work together through class discussions and different in class and out of class assignments. The education that occurs from each is a large part of the education received in the course. Through working together the students create channels of communication with each other. The ability to communicate with each other is an invaluable skill to have. The experience of being in class together creates better teachers, administrators, and lawyers.

CRAFTING A DUAL DEGREE PROGRAM: THE J.D./PH.D. AND J.D./M.S.

In recent years, there has been an increase in the number of law programs combined with other graduate fields. These include Master's in Business Administration, Doctor of Medicine, and Master's and Doctor of Philosophy programs in a variety of disciplines. As an outgrowth of graduate level collaboration, more students are enrolling in departmental programs in both the School of Law and the School of Education. At the University of Wisconsin-Madison there is the possibility of a Master's of Science degree or a Doctorate of Philosophy in Education Administration that can be coupled with a law degree. The Master's degree in Educational Administration requires approximately ten credits in addition to the credits already being earned for the law degree. This requires all electives in each program to be used to satisfy requirement in the other program.

The Ph.D. in Educational Administration requires approximately thirty-five additional credits (not including the dissertation) above those earned for the law degree. These programs offer a rich opportunity to law students who intend to focus their practice on education. Many of the courses in a dual degree program are taken in pursuit of educational administration certification which provides an attorney with invaluable training in educational leadership.

In addition to a dual master's or Ph.D. program, an educational administration student has the option of earning a Ph.D. minor in law. The minor is approximately twelve credits taken outside the focus area of the Ph.D. program and provides a good foundation for the student interested in legal education research.

A law student does not typically enter law school program intent on crafting a dual degree program between educational administration and law. Generally this is an interest that develops once the law student is in his/her first or second year. In addition to educational administration, the University of Wisconsin-Madison has established dual degree programs with the Law School and the La Follette Institute of Public Affairs and Public Policy, the Business School, the Latin American and Iberian Studies Program, the Industrial Relations Research Institute, the Institute for Environmental Studies, the Department of Philosophy, the Department of Sociology, and the School of Library and Information Studies (The University of Wisconsin Law School, University of Wisconsin, 2001).

If the dual degree program is sponsored by the law school, law students are able to transfer twelve credits between the programs. Without sponsorship, a student can only use six credits from his/her other program to count towards his/her law degree. Currently, the joint degree with the Department of Educational Administration and the School of Law is not a sponsored dual degree program.

Unlike an undergraduate double major, the student crafting a dual degree program must be admitted to each school separately. The student does not have to be admitted to both programs in the same year, but he/she must be concurrently registered for both degree programs at some time in the course of study. Crafting such a dual program benefits the student in that it allows some credits to be counted at both schools at the same time, saving the student time and money.

Most law/educational administration dual degree programs take anywhere from four to seven years. An M.S./Law program is the traditional three years for law school plus an additional year for Master's work. A student in a J.D./Ph.D. program can expect to spend a minimum of an additional two years satisfying both degrees (The University of Wisconsin Law School, University of Wisconsin, 2001).

INTERDISCIPLINARY CLASSES AT OTHER UNIVERSITIES AND COLLEGES

Although the School of Law and the School of Education at the University of Wisconsin-Madison promote a collaborative relationship for students in their respective disciplines, they are not alone. Several schools across the country currently offer interdisciplinary classes for education and law students, including Columbia University and Ohio State University. At both universities, courses in the department of educational administration are open to students in the law school and each school supports a collaborative work environment. In addition, there are a handful of professors at universities across the country (many of whom have a J.D. and a Ph.D./Ed.D.) and carry appointments in both a school of education and a law school. These instructors represent the driving force behind the dual programs in education and law and the cross listing of courses in both disciplines.

LEGAL AND EDUCATIONAL ADMINISTRATION IMPLICATIONS FOR THE FUTURE

Interdisciplinary work between law students and educators benefits both kinds of students and enriches the collaborative classroom. Law students and professional educators working together allows students from each discipline to dip into the knowledge and experiences of the other. This cross sharing of perspective and experience begins to answer Jay P. Heubert's call for greater collaboration between educators and lawyers. This increased collaboration and shared perspective introduces the possibility that both educators and lawyers can begin to stem the tide of rising litigation and school liability. By recognizing the complex organization of the education system and the legal system, members in each community can begin to more fully appreciate the relationship they share with one another, anticipate conflict they might confront, and manage crises as they arise.

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SENTENCING YOUTH AS ADULTS: THE SENTENCING PROJECT AND THE OVER-REPRESENTATION OF POOR AND MINORITY YOUTH IN THE CRIMINAL JUSTICE SYSTEM

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47TH ANNUAL CONFERENCE
NOVEMBER 15 – 17, 2001
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Sentencing Youth as Adults: The Sentencing Project and the Over-representation of Poor and Minority Youth in the Criminal Justice System

"The stark reality of crime in America today is that no population poses a larger threat to public safety than younger adult criminals. Teenagers account for the largest portion of all violent crime in America. A review of available evidence is sobering. The number of juveniles arrested for weapons offenses has more than doubled in the last 10 years. Between 1965 and 1992, the number of 12 year olds arrested for violent crime rose 211 percent; the number of 13 and 14 year olds rose 301 percent, and the number of 15 year olds rose 297 percent" (Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fourth Congress, June 27, 1996, p.1).

As frightening as the aforementioned statistics might appear, it is important to keep in mind that the dramatic increases in youth crime and violence over the past decade occurred while America's youth population was declining. More importantly, this nation will soon have more teenagers than it has had in decades. In the closing years of this decade and throughout the next, America will experience a population surge comprised of children of aging baby boomers. Today's enormous cohort of 5-year olds will be tomorrow's teenagers. This is ominous news given that more violent crime is committed by older juveniles between the ages of 15 and 19 than by any other age group (Hearings...1996). Compounding these demographic facts are the recent dramatic rise in drug use among youth, and America finds she must brace herself for an unprecedented violent crime wave.

Moreover, how will our public institutions, namely public schools (elementary and secondary) address the internal and external issues of youth committing more violent offenses at earlier ages? The multiple homicides committed in 1998, 1999, 2000 and 2001 by secondary and middle school students upon fellow classmates and teachers in the states of Mississippi, Oregon, Kentucky, Colorado, and California, suggests serious problems throughout our social institutions. If national trends persist, as they have over the past 15 years, juvenile arrests for violent crime will more than double by the year 2010. The number of juveniles arrested for murder are expected to increase 145 percent over the 1992 level, forcible rape arrests to increase by 66 percent, and aggravated assault arrests by 129 percent (Hearings...1996).

The purpose of this paper is twofold. First, the paper will address juvenile crime and conflicting theories relative to juvenile justice. Explanations for juvenile crime range from those that focus on the individual to those that locate the origins of crime in society. Popular opinions blame poverty, unemployment, family problems and a loss of traditional values, rational choice of "bad" persons, or laws and punishments that are not punitive enough. This paper will explore judicial, executive and legislative decision-making to better understand and explain the complex origins and ecology of juvenile crime and violence. Second, the paper will examine all sides of the debate as to whether the notion of "warehousing" children, of sentencing youth as though they were adults is an efficient and effective response to juvenile crime in America.

We expect this symposium to be of interest to conference attendees involved or concerned about social justice, juvenile justice, juvenile crime and incarceration, at-risk students and alternative sentencing programs just to name a few. The paper also wishes to encourage more research in the field of juvenile justice and incarceration.

ORIGINAL INTENT:
A CASE STUDY OF THEORETICAL ABSTRACTIONS FROM HUMAN PHENOMENA

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Original Intent: A Case Study of Theoretical Abstractions from Human Phenomena

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Introduction

Since 1947, one of the Religion Clauses in the United States Constitution, namely, the Establishment Clause, has been primarily advanced by the "doctrinal approach" – one based on precedent established in case law.[1] Through its application of the doctrinal approach, the Supreme Court has created analytical formulas such as the Lemon Test.[2] Within the last two decades, however, the Court has articulated discomfort with the Lemon Test, and at times has juxtaposed original intent analysis with the doctrinal approach.[3] Full adoption of the doctrine of Original intent, however improbable at this point, would result in significant changes in the body of law generated by the Warren Court regarding issues concerning religion in the public schools.

Political Popularity of Original Intent

A shift in interpretive jurisprudence toward the traditional version of original intent[4] could be the legal basis for the return of Protestant Christian practices in the public schools of the United States. Such a return of Protestant Christian practices to public schools, furthermore, for many individuals and religious organizations, would signify a reclaiming of our nation back for God. This reclamation would include the "snatching" of public schools from the clutches of Christianity's "archenemy," namely, secular humanism[5] and the establishment of biblical morality in the government and the nation.[6]

This perceived need to return America back to its religious heritage arose partly because of the removal of various Christian forms of religious expression from public schools.[7] From the beginning of the common schools until as late as 1955, seventy-seven percent of the public schools in the United States had some form of religious Judeo Christian expression.[8] The practice of these forms of religious expression came to a halt, at least legally, soon thereafter.

Since the 1960s, the work and legacy of the Warren Court resulted in the removal of practices such as reciting the Lord's Prayer, engaging in non-denominational prayer, and standing for moments of silence. Other Constitutional bans such as the teaching of creationism and creation-science, and the posting of the Ten Commandments became a signal to Christian conservatives that the Court was willing to permit, if not encourage, the "religion" of secular humanism. [9]

In the early and mid-1990s, a large number of Americans favored a return of religion to the public schools. In one poll, seventy-eight percent surveyed said that voluntary Bible classes should be taught on school grounds.[10]

Concerning prayer in schools, seventy-eight percent favored the idea.[11] Almost ninety percent, moreover, favored a moment of silence.[12] The value of religion in the public schools and Public Square did not go unnoticed by politicians.

Conservative congressional and presidential candidates capitalized on this religious fervor by making promises to promote traditional religious values in education and society at large.[13] On November 8, 1994, due in part to the efforts of organizations like the Christian Coalition, Heritage Foundation, Christian Legal Society, American Center of Law and Justice, and the Federalist Society, the Republican Party gained control of the U.S. House and Senate.[14]

Republican presidential candidates for the 1996 presidency, Alan Keyes and Pat Buchanan, had already begun to campaign on themes of bringing God back into our society.[15] Passage of legislation like the *Equal Access Act*,[16] and the *Religious Freedom Restoration Act* was viewed by the Christian right as a step in the right moral direction.[17] Even during the Presidential Debate of Election 2000 with Vice-President, Albert Gore, Texas Governor, current U.S. President George W. Bush, if afforded the opportunity, pledged to pack the U.S. Supreme Court with strict constructivists, those who would apply the interpretive method of Original Intent. In recent years, questions have been raised regarding the health of particular members of the Supreme Court. Circulating speculations have even suggested that the President, with the support of a Republican controlled Senate, could be place in the position to fulfill his court packing promise should health concerns lead to a Supreme Court vacancy.

Even with a Court packed with constructivists, overturning the holdings of the Warren Era would, for sure, require conservative activism[18] by a Supreme Court, an activism that would use a method of constitutional interpretation, the results of which would be conducive to fulfilling these promised conservative ends. Originalism is such an interpretive method. It is one that is inherently conservative.

The Employment of Original Intent and the Court

Why would a President seek to appoint Justices according to the method of interpretation they would likely employ? There seems to be a relationship between interpretive methods applied to constitutional provisions regarding religion and the difference in substantive meaning or meanings resultant from the employment of the interpretive methods themselves. For instance, the application of the interpretive method of Original Intent, generally, has yielded meanings of the Religion Clauses that tended to favor political conservatives. Alternatives to Original Intent such as Political Philosophy, Textualism, Moral Philosophy, Stare Decisis, and Neutral Principles generally have lend themselves to meanings of Religion Clauses that tended to favor political liberals. Despite advocates and critics of these interpretive methods, Presidents have screened and nominated judicial candidates anticipating the employment of a jurisprudence that would render rulings that favor the agenda of the nominating administration.

Perception of Originalism

Originalism is a method of constitutional interpretation that views the constitutional text as a written instrument containing the expressed state of mind of its drafters and ratifiers. Originalism presumes that relevant individual and/or collective mental states are discoverable through linguistic and historical analysis.[19] Once discovered, the content of the framers' state of mind, for "hard" or "strict" originalists,[20] ought to be applied to modern legal problems that are substantively-specific and equally-analogous to problems addressed by the framers. For "soft" or "moderate" originalists, in the absence of circumstances that are substantively-specific and equally-analogous to the framer's world, the mental states of the framers that have been identified ought to be converted into principles at a level of abstraction consistent with the mental state of the framers.[21]

Originalism has also been characterized as prescriptive and descriptive communication. Regarding prescriptive communication, the language of the law offers a directive and an imperative.[22] Descriptive communication, on the other hand, is likely to convey beliefs, values, hopes, and fears of what might be prescribed, but not offered as a prescription.[23] Interpreters of language have inferred directives and imperatives from descriptive language. Originalists assume that because the writer of descriptive language believed, valued, hoped for, or feared one thing or another, the writer must have desired that end to occur as a prescription of law.

Originalism has also been viewed as the product of collective and individual states of mind represented by some mechanism that indicated consensus.[24] Votes and group proposals have evinced these collective states of mind. The state of mind of prominent historical individuals has also been sought as a source from which to uncover the original understanding of clauses such as the Religion Clauses.[25] Original intent, thus, has been defined in terms of descriptive or prescriptive directives originating from individuals alone or a collective group of individuals.

Originalists, even those not totally satisfied with the method, generally view originalism as a viable interpretive option. They have characterized the meaning that the framers intended the language to have as "fixed,"[26] "stable,"[27] "objective,"[28] "fair,"[29] and conducive to judicial restraint.[30] Originalism has been presented as the "law" of the Constitution[31] and when compared to it alternatives considered "the lesser evil."[32]

Non-originalists, on the other hand, have asserted that originalists have not met a standard of proof necessary to declare determinacy of the normative meaning of constitutional language.[33] In other words, originalists have not overcome the barriers to making an adequate determination of the framers' intent. Failure to meet such a standard of proof has resulted in the perception by non-originalists that originalism is an illegitimate interpretive method. For instance, critics of originalism have argued that originalists have not adequately answered the questions who is or who are the framers and what is the criteria for qualifying to be one. Should the intent of the framers' intent trump modern decisions to employ the interpretive method? Which historical documents should be relied upon? Less than convincing answers to these and other questions have led non-originalist to conclude that the interpretive method should not be deemed a valid one.

Historical-Documentary-Legal Basis of Understanding Original Intent

The interpretive method of original intent is fundamentally a theoretical abstraction from human phenomena. Humans, not histories, manifest intent. Justices, using historical documents, create theories about possible intent. The Court, thus, in employing original intent as an interpretive method must then rely on static historical documents that provide a less than adequate understanding of the phenomenological aspect of the intent formation process.

Over the last half-decade, I have been quite interested in what happens in the mind of a framer principally responsible for drafting constitution language and what eventually becomes his original intent of the language once drafted. The principle framer of the United States Constitution, James Madison, however, has ceased to be with us for over 200 years. It is virtually impossible, thus, from a phenomenological standpoint, to inquire beyond speculation or to verify with him what went on in his mind and the scope of his intent as he drafted constitutional language. The modern framer of our case study has served as a most relevant subject for such an inquiry.

Biographical Case-study Basis of Understanding Original Intent

Sir Ellis Clarke[34] was born in Trinidad and Tobago in 1919. He began his formal education at the age of three-years-old in the private school run by his mother. In 1926, Clarke entered Belmont Intermediate School before attending the prestigious St. Mary's College in 1929. In 1936, "Sir Ellis," as commonly referred to in later years, won the highest honor in the British colony in the area of mathematics. Winning the Island Scholarship afforded him an education of the highest quality day and consequently a profession of choice. Clarke chose to study law.

In 1937, Clarke headed for University College, London and began his legal training at the historic Grays Inn. He completed his L.L.B. degree in law, graduated with honors in 1940, and was called to the British Bar in 1941. Upon his return to Trinidad in that year, he was admitted to the Bar in his own country and began what would later be characterized as a stellar fourteen year private practice in the law. In 1954, Sir Ellis served in Her Majesty's government as Solicitor General and as Deputy Colonial Secretary in 1956. The next year Clarke became the colony's Attorney General. In 1961, amidst a national movement towards independence from the Mother Country, Premier Eric Williams appointed Ellis Clarke to the position of Constitutional Advisor to the Cabinet. It was during his tenure in this position that Clarke drafted what later became the Independence Constitution of 1962.

Clarke would thereafter be beknighted thrice by Her Majesty Queen Elizabeth II as well as serve as Permanent Representative to the United Nations, Permanent Representative to the Organization of American States, and Ambassador to Washington and Mexico. He also served as his nation's second Governor-General and as the First President of the Republic of Trinidad and Tobago. His contribution as "architect" of the 1962 Trinidad and Tobago Independence Constitution, however, would forever remain unprecedented in the history of the Country.

The Intent Formation Process and Clarke

The life of Ellis Clarke, as "architect" of the Trinidad and Tobago Constitution has also made a contribution to our understanding of Original Intent. It has served as a living case study that inquired into the intent formation process, a process that occurs when a framer is responsible for and engaged in the task of the construction of constitutional language. Such an inquiry has yielded new insight that could serve as a guide when attempting to derive normative meaning intended of the religion clauses of the First Amendment.

Any findings yielded from case study methods, like all research methods, possess limitations regarding the degree to which generalization derived thereby would be relevant to new situations. I am also quite aware of limitations of possible bias rooted in nationalist predispositions that might be resistant to any association of ones constitutional framer to that of any other country. For some, thus, the mere comparison of Madison with Clarke, especially in his most romanticized Madisonian form, would seem, no doubt, to tarnish an American icon whose nobleness and contribution has been esteemed as sacrosanct. I would, however, immediately retort that for some

Trinidadians, the comparison of Clarke to Madison would be equally repugnant. Other limitations such as differences in the lives of the framers such as time period, unique and irreconcilable distinctions in forms of government, and social circumstances surrounding the call for a constitution must all be taken into account.

Despite these apparent limitations, however, there is at least two common features which the two Founding Fathers, and perhaps others framers possess, that cannot be overlooked. The first commonality is their humanity. Beneath the obvious presumption that Madison and Clarke were humans lies the realism that their humanity encompassed all of the physical, social, psychological, and spiritual dynamics viable during their experience as constitutional framers. The second commonality to both men was the fact that Clarke and Madison were faced with the primary and enormous responsibility of drafting original constitutional language and guiding it through deliberative processes towards its final end.

An analysis of this constitutional phase of Clarke's life has made a contribution to the debate regarding the legitimacy of the doctrine of original intent and its applicability to future litigation. Such an analysis has also shed light on the parameters of what is humanly possible for a framer to intend as well as provided insight concerning the limits of the application of principles derived from the framers' intent as well. I have discussed a number of these ideas in another work.[35] Suffice it to say here, however, that an analysis of the experience of Clarke from the moment he applied his pen to the first draft until its adoption has provided an alternative premise from which to engage in the debate regarding the legitimacy of the interpretive method of Original Intent.[36]

An Operative Premise and the Pursuit of Textual Discrimination

The operative premise upon which the modern discussion regarding original intent proceeds asserts that, not only can a framer or framers be identified, but that the meaning he or they intended constitutional language to have can be derived from a wide range of historical documents alleged to contain such intent. As before mentioned, Justices, using historical documents, create theories about possible intent. Members of the Supreme Court, nonetheless, could not, at least in any meaningful way, include every available historical source deemed to have contained the intent of the framers. Furthermore, unless it is assumed that anything and everything a framer says is pertinent to a determination of the normative meaning of a particular constitutional provision, such as the Religion Clauses, some mechanism which separates pertinent from impertinent historical documents is needed. I suggest a "standard of textual discrimination," be employed to assist in making a distinction between relevant and irrelevant sources use when deriving a normative meaning of the Religion Clauses.[37]

The application of such a standard could serve as a means for a justification of an assemblage of historical sources from which normative meaning of constitutional language has been derived.[38] The standard could also have the indirect effect of producing "restrained version" of original intent, one that could only be derived from historical sources that meet the standard of textual discrimination.

A Rationale for Textual Discrimination

A number of historical documents have been cited in Supreme Court cases from 1878 well into the 1990s allegedly as containing the original intent of the framer or framers. Such documents include references to James Madison's *Memorial and Remonstrance*, his *Letter to the Rev. Jasper Adams* (1832), Patrick Henry's *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784-1785), and *Virginia Bill of Rights (1776)*. The Supreme Court has also cited the *Declaration of Independence* (1776), Jefferson's *Notes on the State of Virginia* (1782), the *Virginia Statute of Religious Liberty* (1787), and his famous *Letter to the Dansbury Baptist* (1802). Other historical documents used included the *Old Deluder Satan Act* (1647), *Mayflower Compact*, the *Northwest Ordinance of 1787*, and *Bill for the Incorporation of the Protestant Episcopal Church* (1786). The Court has even made references to monarchs from Ferdinand and Isabella to George III, state constitutions and laws, the *Book of Common Prayer*, the ideology of Natural Law, personalities such as Sir Walter Raleigh, George Mason, and Elihu Roots and events such as the Protestant Reformation and the Spanish Inquisition.

There seems to be a significant difference between the construction of versions of original intent by a historian and the assemblage of historical documents to be used as the basis of original intent by a Justice. Historians are free to consider the full scope of available ideas of individuals or to reconstruct a host of events using a number of kinds of historical documents such as personal letters, diaries, academic records, interviews, and the direct observation of the historian him or herself. From these resources, the historian could conceivably reconstruct trends in thought or produce an intellectual history over an extended period of time. Furthermore, the methodological research conventions of the profession of a historian grant him or her freedom to merge ideas and events in varying degrees of association, however tentative. It is not uncommon for historians to be granted recognition for the mere suggestion of a new probable historical association, providing that some historical evidence serves as a basis for its authority.

A Supreme Court Justice does not have such luxuries and should not venture to take them. Article III of the United States Constitution is silent regarding which interpretive method should be employed, thus, leaving this selection to common conventions and judicial preferences of individual justices. Any construction of assemblages comprised of historical documents from which notions of a framer's intent are derived, is fair game to be used by a Justice. Supreme Court Justices, nonetheless, have not been empowered by the Constitution to be historians. Their fundamental task begins with constitutional language and ends with an interpretation of it. From constitutional language, Justices who wish to employ historical documents in support of a legitimate version of original intent would then need to make a differentiation between documents that contain evidence of what I have referred to as Constitutional Intent from those that contain Non-Constitutional Intent. The features that distinguish the two concepts will be discussed later.

To press the point to its most radical end, even Jefferson's famous *Letter to the Dansbury Baptist* (1802), from which came the well celebrated "wall of separation between church and state" metaphor, is not only void of elements of Constitutional Intent, but was written over a decade after the original intent was embodied in constitutional language. It is implausible to think that a framer, at the time of drafting the language, could have had in mind what Jefferson would say some ten years in the future. While it would be quite permissible for a historian to retroactively reconstruct a normative meaning of the Establishment Clause, a Supreme Court Justice must require historical evidence that connects the *Letter to the Dansbury Baptist* to the intent formation process of the drafter of the language. Had Madison, by some extraordinary phenomena, made reference to Jefferson's letter during the deliberations of the First Congress, such an event would have at least produce historical evidence to connect Jefferson's intent to language. The metaphor should be used less by Justices in reference to the Establishment Clause and better perhaps, not used at all in the adjudication of Establishment Clause cases.

Original Intent and a Revisitation of *Everson*

The 1947 Supreme Court Case, Everson v. Board of Ed.,[39] the Court constructed a version of original intent by its use of a number of historical sources. The Court interpreted them in a manner that resulted in a broad interpretation of the Establishment Clause. Secondly, the Court codified this broad understanding in doctrinaire language which itself, in future cases, would be construed to provide an even broader interpretation than the historical sources and the framers themselves would allow. The *Everson,* precedent, thus, served as a catalyst in the shift from employing original intent to using a doctrinal approach in the adjudication of Establishment Clause cases. The Everson case, moreover, was pivotal in education law regarding religion in the public schools. Its version of original intent gave rise to a broad construction of Establishment Clause language, the likes of which still haunts members of the Court who wish to overturn its legacy.

In the case, both the majority and the minority of the Court referred to a number of historical documents to support their version of original intent. Justice Black relied on a number of historical references already cited.[40] Justice Jackson and Rutledge did so likewise.[41] What should be noted about both assemblages of documents is that not only were similar document selected, but also the different interpretations given to these same historical documents.

The subjective and unprincipled manner in which the Justices selected, interpreted, and constructed a version of original intent may in itself have informed the Court of a need to decentralized the use of the framers' intent and use it as adorning dicta. This is what indeed happened in almost all of the subsequent Establishment Clause cases. Insight gleaned from the intent formation process of a modern framer suggests, presuming the use of original intent trumps the intent the framers had of their intent, that dicta is the only proper place for much of the original intent analysis as an interpretive method.

An American Constitutional Framer and Original Intent

If any single individual were to be considered "The Framer" of the Religion Clauses, that person would have to be James Madison. I have, in another work[42] suggested that Madison may have been atypical to other framers in light of the extraordinary contribution he made to the constructing of language that would expressly protect religious freedom. He was brilliant. Madison, nonetheless, seemed to be typical of other framers when it came to the relationship between the intent formation process and the construction of Religion Clause.

The phenomena of the intent formation process, namely dispossession, internalization, and subsumption, ascertained through an examination of the Clarke during his Independence Constitutional experience, seemed to be also found in the constitutional experience of James Madison. Early research findings suggest that this is likely to be the case. Perhaps, future research would provide more comprehensive verification.

Original Intent and the Hermaneutical Gap

Time and the changes in the world and world views over time seem to be the predominant barrier that originalists face. The crux of the barrier is one of application. Paul Brest argued that in applying the doctrine of original intent the interpreter-historian's task is three fold: (1) to immerse oneself into the world of the adopters to try to understand constitutional concepts and values from their perspectives; (2) ascertain the adopters' interpretive intent and the intended scope of the provisions in question; and (3) translate the adopters' concepts and intentions into our time and apply them to a situation that the adopters did not foresee.[43]

Not everything in the mind of a drafter of constitution language, however, changes significantly over time. Certain circumstances and conceptualizations to which the Religion Clauses in the United States Constitution were intended to apply may be the very circumstances or those quite similarly found in the modern world. Substantive-specific applications, meaning the application of the doctrine of originalism to objects, facts, and circumstances essentially equal in both worlds, are quite possible.

In the absence of substantive-specific applications, originalist interpreters must reach modern legal disputes through a derivation and application of principle. The problem with deriving and applying principles, especially those containing the non-constitutional intent of the framers, is that inference-making requires the interpreter to (1) extract values, beliefs, and other motives; (2) raise these motives to a level of generality applicable to modern legal dispute; and (3) then conjecture based on the principle, that if the framers were present in the modern world, they would have resolved the modern legal disputes in a certain way. What we can discern from what happens in the mind of a living framer is that while principles at a low-level of generality might be permissible, using a principle at a high level generality in order to make hermaneutical leap would not. Even if Originalists somehow solved the problem of the hermeneutical gap, they would still have to consider the relative weight of evidence that suggests that the framers never intended their "intent" be used as a method of constitutional interpretation

Selected Case Law Likely Affected

Obviously, if the idea that the framers never intended their intent to be used as a method of constitutional interpretation were adhered to, all Establishment Clause cases pertaining to religion in the public schools would remain unaffected. Likewise, if the Federal Courts continue to decentralize the employment of original intent, the same case law would also remain unaffected. If, on the other hand, original intent were applied, a number of cases might be modified to allow for more religious expression.[44] Cases such as *Wallace v. Jaffree,*[45] *Stone v. Graham*[46] *Zorach v Clauson,*[47] *Engle v. Vitale. Epperson v. Arkansas*[48] *Edwards v. Aquillard,*[49] *Lynch v. Donnell*[50] and most of the tax-in-aid cases which prohibited providing secular resources to parochial schools are likely to be affected by an employment of original intent.

Conclusion

In conclusion, the interpretive method of original intent is fundamentally a theoretical abstraction of human phenomena. Humans, not histories, have intent. Justices, using historical documents, create theories about possible intent. The Court, thus, in employing original intent as an interpretive method must then rely on static historical documents that provide a less than adequate understanding of the phenomenological aspect of the intent formation process. Any premise deemed legitimate, which suggests that an overly wide range of historical documents can used in forming assemblages must be reconsidered. While all historical documents could legitimately used by historians to ascertain ranges and versions of intent, Justices should not take such liberties in utilizing them. They must begin, not with historical documents, but with Establishment Clause language. Then perhaps the Court could proceed with the record of the deliberations and construction of Establishment Clause language and the ratifying conventions. The Court might also be guided by non-documentary data that may inform them about what is likely to occur in the mind of a framer when at the task of drafting constitutional language.

Should the Court choose to employ historical documents in quest of a version of original intent, it should at least avoid those documents which possess no credible evidence a dispossession of a framer's personal beliefs, his internalization of the collective will of a people, and the submission of language which embodies that will to the an agency of final authority. Justices must apply a standard of textual discrimination when constructing historical assemblage from which they intend to derive a version of original intent.

Regarding deriving principles to bridge the hermaneutical gap, a second interpretive process involves limiting the level of abstraction of principles derived from constitutional intent and discontinuing the application of constitutional intent and/or derived principles to modern circumstances beyond what we know about the limitation of human intent. Enough has been said about the challenge of leaping over the hermeneutical gap and level of abstraction to which principles should be limited. What is important to the future of the Original Intent is not the mere understanding the limits of applying the interpretive method, in substance or principle, but for Justices to foster the courage and choose an alternative method when tempted to beyond those limitations. Hopefully, originalists, on and off the bench, will find such courage.

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[1] The doctrinal approach is one of several alternative interpretive methods to original intent. These alternative methods have been referred to in substantive terms or the means of analysis used to employ them. (Political Philosophy or Structural Analysis, Textualism or Verbal Analysis, Moral Philosophy or Prudential Analysis, Stare Decisis or Doctrinal Analysis, and Neutral Principles or Purposive Analysis. See also Walter, Murphy F., James E. Fleming, and William F. Harris, *American Constitutional Interpretation*. Mineola, New York: The Foundation Press, Inc. 1986.

[2] The Lemon Test is an analytical device used in making a determination of whether an unconstitutional union exists between government and religion. The test emerged from legal doctrine found in two Establishment Clause cases: *Abington Twn. Sch. Dist. v. Sche*mpp, 370 U.S. 421 (1962) and *Walz v. Tax Comm. of N.Y.*,397 U.S. 664 (1790). *Lemon v. Kurtzm*an, 403 U.S. 602 (1971) The Lemon Test inquires into whether an enactment of governmental legislation 1) has a secular purpose, 2) has the primary effect of advancing or inhibiting religion, and 3) whether the legislation fosters excessive entanglement between government and religion.

[3] See *Marsh v. Chambers*, 463 U.S. 783 (1983), *Wisconsin v. Yoder*, 406 U.S. 205 (1971), *Lynch v. Donnelly*, 449 U.S. 38 (1981), and *Lee v. Weisman*, 122 S.Ct. 2649 (1992). Justice Scalia has compared the Court's inconsistent application of the Lemon Test to the summoning of "ghouls of the past" to meet activist ends.

[4] In general, the doctrine of original intent consists of a set of propositions founded on the premise that constitutional interpretation should rely on a determination of the meaning its framers intended the language to have.

[5] William R. Estep. *Revolution Within The Revolution* (Grand Rapids, Michigan: William B. Eerdmans Pub. 1990), 7, 13.

[6] Steven Carter. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. New York: Basic Books. 1993, 24.

[7] Tim LaHaye, "The Religion of Secular Humanism," *Public Schools and the First Amendment*, ed. Stanley M. Elam. Proceedings of a Conference Sponsored by Phi Delta Kappa School of Education, Indiana University, April 20-21, 1982, Indianapolis, Indiana. 1-13.

[8] Don Conway, "Religion and Public Education in the States,"*International Journal of Religious Education*. March 1956:34-40.

[9] *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 1058(1987).

[10] Nancy Gibbs,"Americas Holy War," *Time*, 9 December 1991, 64.

[11] Ibid.

[12] Ibid.

[13] Karen Tumalty. "Man with a Vision," *Time*, 9 January 1994, 23-32.

[14] *Congressional Record. Proceedings and Debates of the 103 d Congress, Second Session* Vol. 140 August 8 1994, No. 1, H.7186.

[15] Pat Buchanan. from "ON The Issues" http://buchanan.org/ pissue.html February 16, 1996, 1-6.

[16] P.L.98-337 Sec. 801. August 11, 1984.

[17] 107 *Statutes at* Large 1488 Sec. 504.

[18] Judicial activism has been associated with liberal judges who rely on moral philosophy as an interpretive method of constitutional provisions. See Peter Irons, "Making Law: The Case for Judicial Activism," *24 Valparaiso University Law Review* 35 (1989). See also Lino A. Graglia, "It's Not Constitutionalism, it's Judicial Activism," *19 Harvard Journal of Law and Public Policy* 294 (1996). Originalists have actively applied or overlooked their doctrine depending on results. See "Conservatives v. Originalism" See infra note 61, at 465.

[19] This characterization of originalism has emerged as a result of analyses of historical documents of the framers, the scholarly literature on the subject, and its application by the Supreme Court.

[20] Raoul Berger, *Federalism: The Founders'* Design (Norman, Oklahoma: University of Oklahoma Press, 1987), 191.

[21] Robert Bork, *The Great Debate: Interpreting Our Written Constitution*. Washington, D.C.: The Federalist Society, 1986), 48-49. Substantively specific intent refers to derivations of purposive conceptualizations likely to have been in the mind of a framer regarding the meaning constitutional language. Substantively specific intent, moreover, must be justified not only by the identification of intent, but also by the substantive existence of historical phenomena directly or vicariously experienced by the framer. Abstract principles can be applied to contexts unparalleled to the original historical context from which the principle was drawn.

[22] Frederick Schauer, "Defining Originalism," *19 Harvard Journal of Law and Public Policy*. 343 (1996).

[23] Ibid.

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[24] Ronald Dworkin, "The Forum Principle," 56 *New York University Law Review* 447, 467 (1981).

[25] Ibid.

[26] Justice Antonin Scalia, "Originalism: The Lesser Evil," 57 *Cincinnati Law Review* 840, 862 (1989).

[27] Ibid. 7, 854.

[28] Lillian R. BeVier, "The Integrity and Impersonality of Originalism," 19 *Harvard Journal of Law and Public Policy* 289-290 (1996).

[29] Id. at 288.

[30] Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster Inc., 1990), 154.

[31] Berger, supra note 34, at 19.

[32] Scalia, supra note 40, at 862.

[33] Gary Lawson, "Legal Indeterminacy: Its Cause and Cure," 19 *Harvard Journal of Law and Public Policy* 417 (1996).

[34] Timothy John Seigler, *Royal Son of the Soil: The Life of Sir Ellis Clarke of Trinidad and Tobago.* Trinidad and Tobago, West Indies: Esse Publishing House, Ltd. 2001.

[35] Timothy John Seigler. *An Analysis of the Interpretive Method of Original Intent to the Establishment Clause of the United States Constitution and Its Implications for Public Schools:* Dissertation Abstract, Inc. Vol. 57, No. April 1997, 4529-A.

[36] Although the interpretive method of Textualism in the one practiced by Clarke himself, it is still quite possible that others might used this work as a historical document from which to abstract a Clarke version of original intent regarding the Independence Constitution of Trinidad and Tobago.

[37] The term "standard of discrimination" is used simply to refer to criteria by which a distinction is to be made between relevant and irrelevant historical sources. The use of the word "discrimination" in the phrase is used in its broadest sense and should not be confused with the specific connotations and denotations related to discrimination based on race, gender, age, disability, or sexual orientation.

[38] This distinction in placement will be helpful in understanding the difference between reliance on the intent of the framers by originalists and supplementary reliance by non-originalists.

[39] 330 U.S. 1 (1947).

[40] The Constitutional text of the First Amendment, European persecutions because of religious beliefs by government, The history of colonial establishments, Catholic and Protestant persecutions of each other, persecution of Jews in Europe, Colonial Bills of Rights, *Virginia Bill 1785-1786 for Support of Teachers of the Christian Religion*, James Madison's *Memorial and Remonstrance*, Thomas Jefferson's, *Virginia Bill for Religious Liberty*, Role of Madison and Jefferson in the adoption of the First Amendment, Jefferson's "Wall of Separation" were relied upon heavily.

[41] Bill of Rights, "Our "Forefather," Jefferson's 1779 *Virginia Bill for Religious Freedom*, Madison's authorship of the First Amendment, Madison and Mason's 1776 *Virginia's Declaration of Rights*, Madison's role at the Constitutional Convention, Madison's proposal and sponsorship of the First Amendment.

[42] See Timothy Seigler. *An Analysis of the Interpretive Methods of Original Intent.*

[43] Paul Brest, "The Misconceived Quest for the Original Understanding," 60 *Boston University Law Review* 204 (1980).

[44] *Zobrest v. Catilina Foothills.* 509 U.S. 1 (1993); *Board of Education of Kiryas Joel v. Grumet.*. 114 S.Ct. 544 (1994)

[45] 472 U.S. 38 (1985)

[46] 449 U.S. 38 (1981)

[47] 343 U.S. 306 (1962)

[48] 393 U.S. 97 (1968)

[49] 482 U.S. 578 (1987)

[50] 465 U.S. 668 (1984)

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